TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1912.

No. 944.

CHARLES H. SWIGART, E. McCULLOH, AND R. K. TIFFANY, APPELLANTS,

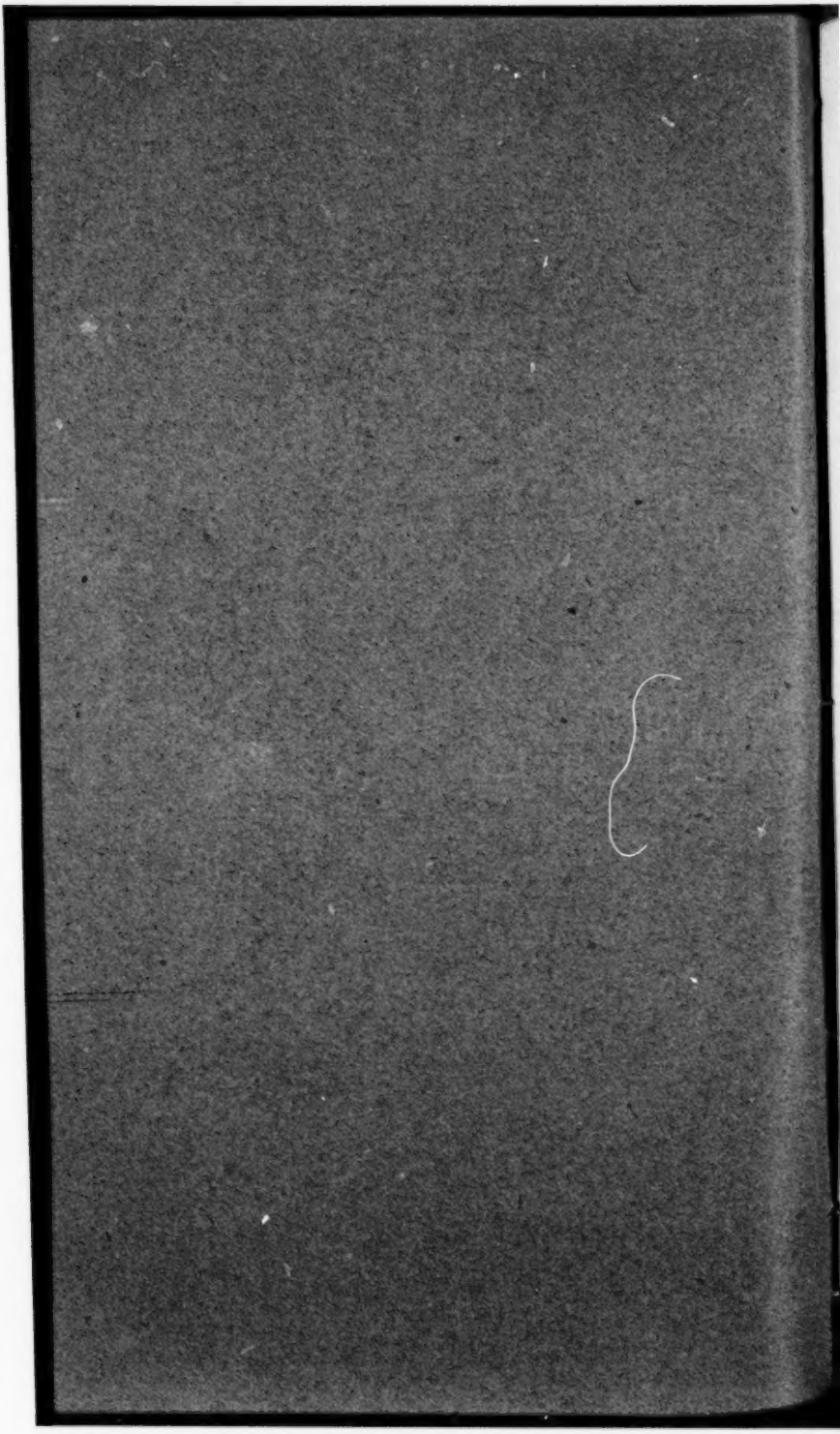
vs.

D. P. BAKER.

APPEAL FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

FILED JANUARY 24, 1913.

(23519)



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a (Indorsed:) No. 2125. United States Circuit Court of Appeals for the Ninth Circuit. D. P. Baker, appellant, vs. Charles H. Swigart, E. McCulloh, and R. K. Tiffany, appellees. Transcript of record. Upon appeal from the United States District Court for the Eastern District of Washington, Northern Division. Received Apr. 5, 1912, F. D. Monckton, clerk. Filed Apr. 6, 1912, Frank D. Monckton, clerk.

1 In the District Court of the United States, Eastern District of Washington, Northern Division.

D. P. BAKER, COMPLAINANT,
vs.
CHARLES H. SWIGART, E. MCCULLOH, AND R. K. TIFFANY, respondents. } No. 76.

Names and addresses of solicitors of record: Hughes, McMicken, Dovell & Ramsey, 661–670 Colman Building, Seattle, Washington, solicitors for complainant; Oscar Cain, Esquire, United States attorney, and E. C. MacDonald, Esquire, assistant United States attorney, Federal Building, Spokane, Washington, solicitors for defendants.

United States of America, Circuit Court of the United States, Ninth Judicial Circuit, Eastern District of Washington.

In Equity.

The President of the United States of America, greeting: To Charles H. Swigart, E. McCulloh, and R. K. Tiffany:

You are hereby commanded that you be and appear in said circuit court of the United States aforesaid, at the court room of said court in the city of North Yakima, Washington, on the seventh day of August, 1911, to answer a bill of complaint filed against you in
2 said court by D. P. Baker, a citizen of the State of Washington, and to do and receive what the court shall have considered in that behalf. And this you are not to omit, under the penalty of five thousand dollars.

Witness, the honorable Edward D. White, Chief Justice of the United States, and the seal of the said circuit court the 17th day of June, 1911, and in the 135th year of the independence of the United States of America.

[SEAL.] FRANK C. NASH, *Clerk.*

Memorandum pursuant to rule 12, Supreme Court, U. S.

You are hereby required to enter your appearance in the above mentioned suit on or before the first Monday of August, 1911, next, at the clerk's office of said court, pursuant to said bill, otherwise the said bill will be taken pro confesso.

FRANK C. NASH, *Clerk.*

Return on service of writ.

UNITED STATES OF AMERICA,
Eastern District of Washington, ss.

I hereby certify and return that I served the annexed subpoena in equity on the therein-named E. McCulloh and R. K. Tiffany in Sunnyside, Washington, on the 20th day of June, 1911, and on Chas. H. Swigart in North Yakima, Washington, on the 19th day of June, 1911, by handing to and leaving a true and correct copy thereof with each of them at the times and on the dates above mentioned, personally, in said district.

W. A. HALTEMAN, *U. S. Marshal.*
By A. N. SHORT, *Deputy.*

3 (Endorsements:) Subpoena in equity and return on service of writ by U. S. marshal.
Filed June 23, 1911.

FRANK C. NASH, *Clerk.*

In the United States District Court, Eastern District of the State of Washington, in and for the county of Yakima.

D. P. BAKER, PLAINTIFF,
vs.
CHARLES H. SWIGART, E. MCCULLOH, AND R. K. TIFFANY, RESPONDENTS.

AFFIDAVIT.

STATE OF WASHINGTON,
County of Yakima, ss.

I, E. M. Philebaum, being first duly sworn, on oath depose and say: That I am and at all times mentioned herein have been a duly appointed, qualified, and acting fiscal agent of the U. S. Reclamation Service, Sunnyside unit, Yakima project; that, among other things, my duties consist in making out water rental applications for parties desiring to secure water on a temporary basis in the said Sunnyside unit, and the receiving of the amount due the United States under said applications; that on or about the 1st day of May, 1911, the plaintiff herein appeared at my office and made request of me for the usual application blank to cover a water rental contract; that I supplied him with said application blank, and that he signed same in duplicate, but that he did not fill in any of the information
4 which should be supplied in said blank; that I then informed him that it would also be necessary to make payment thereunder, but he replied that he had arranged with the superintendent of irrigation for a supply of water until such time as he could raise

the necessary money with which to make payment, or words to that effect.

I further depose and say that the said plaintiff has never completed said application or made any payments thereunder.

The said application, as signed by the said plaintiff, is attached hereto and marked Exhibit "A."

Dated this ——— day of ———, 1911.

(Signed) E. M. PHILEBAUM.

Subscribed and sworn to before me this 23d day of June, 1911.

[NOTARIAL SEAL.] (Signed) N. K. BUCK,
Notary Public in and for the State of Washington,
Residing at ———.

My commission expires April 3, 1915.

EXHIBIT "A."

Form approved by the Secretary of the Interior January 17, 1910. No. ———: Department of the Interior. United States Reclamation Service. ——— project. Application for ——— water service. ———, Washington, ———, 191–. To the project engineer, ———, Wash.

5 I hereby apply for ——— water from ——— for irrigation during the ——— season, commencing ——— and ending ——— upon ———, section ———, township ——— N., range ——— E. W. M., containing ——— acres of irrigable land, said application being made subject to the following conditions:

The charge for water service shall be at the rate of ——— per acre for the season, payable in advance at the date of this application.

The amount of water to be furnished under this application shall be limited to the amount beneficially used upon said lands or so much thereof as shall constitute a proportionate share per acre of the actual supply available at any time during the continuance of this application for all lands watered under ——— project. Said water will be delivered at ——— and shall there be received by me and conveyed at my expense to the lands above described.

The proper representative of the United States Reclamation Service shall have full control of the distribution of water through said canal system, and shall have the right, in order to secure an economical and efficient service to establish and enforce such rules and regulations as such representatives may deem proper, to all of which rules and regulations I hereby agree to conform.

6 Any violation of the rules and regulations so established, either by me or by the occupants of said lands, shall be sufficient cause for the cancellation of this application and the discontinuance of water service thereunder.

The United States shall not be responsible for failure to supply water under this application caused by insufficient supply of water

in ——— River, hostile diversion, or drought, nor on account of any other distribution than that herein stipulated for, directed, or ordered to be made by any valid and subsisting order or decree of a competent court, nor for any damages by floods, acts of hostility, or unavoidable accidents.

It is further understood that the water supply to be furnished under this application is limited to the supply available from the ——— River.

The furnishing of water hereunder to the lands aforesaid shall not be taken or construed as binding the United States, after the termination of this application, to furnish water to said lands, or any part thereof, nor shall it, under any circumstances, become the basis of a permanent water right.

(Signed) D. P. BAKER,
Applicant.

Approved for ——— acres of irrigable land.

———— ————,
Engineer (or other proper official).

——— 191—.

Received of above-named applicant $———, being for ——— acres of irrigable land at $——— per acre.

———— ————,
Special Fiscal Agent.

7 (Endorsements:) Affidavit of I. E. M. Philebaum.
Filed June 29, 1911.

FRANK C. NASH, *Clerk.*
By EDWARD E. CLEAVER, *Deputy.*

In the United States District Court, Eastern District of the State of Washington, in and for the county of Yakima.

D. P. BAKER, PLAINTIFF,
vs.
CHARLES H. SWIGART, E. MCCULLOH, AND R. K. TIFFANY, respondents.

AFFIDAVIT.

STATE OF WASHINGTON,
County of Yakima, ss:

I, R. K. Tiffany, being first duly sworn, on oath depose and say that I am, and at all times mentioned herein have been, the duly appointed, qualified, and acting superintendent of irrigation, Sunnyside unit, Yakima project, and that on, or about, the first day of may, 1911, the plaintiff herein came to my office and made request of me for water to be supplied for certain land in the southeast quarter (SE. ¼) of section two (2), township ten (10) north, range twenty-one (21) E. W. M., which had not been opened to water-right

entry by order of the Secretary of the Interior; that I then told him that I would recommend that, if possible, his land in question should be included in the list of lands for which water-right applications would be accepted in 1911, but that in case it was not prac-
8 ticable to have such list revised, water would be furnished to him upon a water-rental basis at the rate of two dollars and fifty cents ($2.50) per acre.

That the plaintiff stated that he would prefer to secure water for these lands upon a water-right application, rather than upon a rental basis, but that if the revision of the list were not made, he would be glad to rent water for these lands at the rate of two dollars and fifty cents ($2.50) per acre for the irrigation season of 1911.

That, acting upon his promises and assurances, that, in case the list referred to was not so revised he would enter into a water-rental contract and make payment at the rate of two dollars and fifty cents ($2.50) per acre for the lands irrigated during 1911, I thereupon ordered water turned on to his land for that portion which he had prepared for irrigation in addition to the thirty-one (31) acres for which he was entitled to water by order of the Secretary of the Interior.

That shortly thereafter I verbally recommended that the list of lands open for water-right entry in 1911 be revised to include the lands which the plaintiff now desires to irrigate, but that the amendment in the list was not made because of definite instructions regarding such amendments which had been given by the Director of the Reclamation Service about March 31, 1911, but which letter had not come to my knowledge until after the above-mentioned interview with the plaintiff.

I do further depose and say that the water was permitted to run upon the said additional area beyond the time within which the plaintiff had agreed to make water-rental contract and pay-
9 ment, and that, after due notice from the patrolman to the plaintiff that the water would be cut off unless such contract and payment were made, I finally gave orders to the patrolman to cut off the water service from all lands of the plaintiff, except the thirty-one (31) acres to which he is entitled under his water-right application.

(Signed) R. K. TIFFANY.

Subscribed and sworn to before me this 24th day of June, 1911.

[NOTARIAL SEAL.] (Signed) E. M. PHILEBAUM,
Notary Public in and for the State of Washington, Residing at Sunnyside.

My commission expires Oct. 15, 1911.

(Endorsements:) Affidavit of R. K. Tiffany.
Filed June 29, 1911.

FRANK C. NASH, *Clerk.*
By EDWARD E. CLEAVER, *Deputy.*

In the United States District Court, Eastern District of the State of Washington, in and for the County of Yakima.

D. P. BAKER, PLAINTIFF,
vs.
CHARLES H. SWIGART, E. McCULLOH AND R. K. Tiffany, respondents.

AFFIDAVIT.

STATE OF WASHINGTON,
County of Yakima, ss:

I, E. McCulloh, being first duly sworn, on oath depose and
10 say that I am the duly appointed, qualified and acting project engineer, Sunnyside unit, Yakima project; that, among other things, my duties consist in making recommendations for lands for which water shall be made available under the said Sunnyside Unit. The records of this office show that there was recommended, by my predecessor, thirty-one (31) acres of land for which water would be available in the southeast quarter (SE. ¼) of section two (2), township ten (10) north, range twenty-one (21) E. W. M., but that no further recommendation for land available for water in said subdivision has been made and neither I, nor anyone acting in my behalf, have ever made any recommendation for any further water available in the southeast quarter (SE. ¼) of said section two (2) up to and including the year 1911, except the thirty-one (31) acres hereinabove mentioned, and that to the best of my knowledge and belief the Secretary of the Interior has never promulgated any order making any further water available upon water-right application in the southeast quarter (SE. ¼) of the said section than the said thirty-one (31) acres above mentioned.

I further depose and say that it is a further part of my duties to pass upon and approve water-rental contracts, whereby a temporary supply of water is furnished for lands which have not yet been opened for water right by order of the Secretary of the Interior, and that I have never passed upon nor approved any water-rental contract for the said southeast quarter (SE. ¼) of said section two (2).

I do further depose and say that the land for which water is available under order of the Secretary of the Interior and for
11 which no water is available is shown on the attached blue print marked "S. P. 4034."

(Signed) E. McCULLOH.

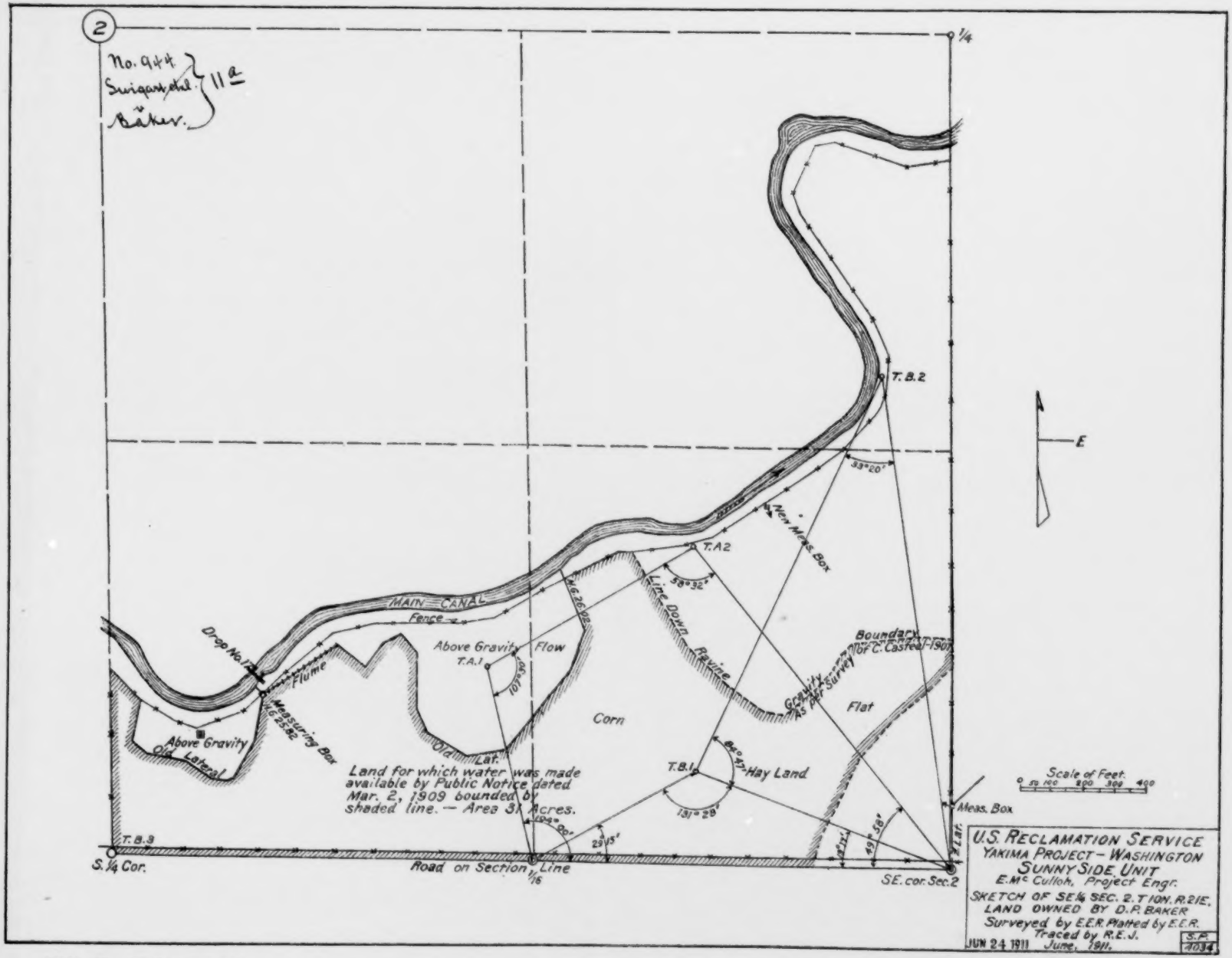
Subscribed and sworn to before me this 24th day of June, 1911.

[NOTARIAL SEAL.] (Signed) E. M. PHILEBAUM,
Notary Public in and for the State of Washington, Residing at Sunnyside.

My commission expires Oct. 15, 1911.

(Endorsement:) Affidavit of E. McCulloh.

Filed June 29, 1911. FRANK C. NASH, *Clerk.*
By EDWARD E. CLEAVER, *Deputy Clerk.*



75529—13. (To face page 6.)

In the Circuit Court of the United States, for the Eastern District of Washington, Southern Division.

D. P. BAKER, COMPLAINANT,
vs.
CHARLES H. SWIGART, E. MCCULLOH, AND R. K. TIFFANY, respondents.

AFFIDAVIT.

UNITED STATES OF AMERICA,
Eastern District of Washington, County of Yakima, ss:

H. Y. Saint and A. C. Steinman, register and receiver, respectively, of the U. S. Land Office, being first duly sworn, on their oaths depose and say:

That they are the duly appointed, qualified, and acting register and receiver of the United States Land Office at North
12 Yakima, Washington, and that it is their duty as such register and receiver to receive and pass upon applications for water right under the Sunnyside unit of the Yakima project, Washington, to receive all moneys paid as dues under the said water-right applications, to notify the office of the project engineer of the U. S. Reclamation Service when such applications have been received and passed upon, when such moneys have been received, and when said lands are entitled to the privileges of water rights under the regulations of the Department of the Interior.

The affiants further depose and say that the basis for the actions outlined above is the act of Congress commonly known as the reclamation act, supplemented by rules and regulations of the Department of the Interior.

The said rules and regulations, among other things, provided:

1. That a public notice be issued by the Secretary of the Interior authorizing the acceptance of water-right applications and the supplying of water thereunder for certain lands, the said notice being accompanied by a list showing in detail the number of acres under such subdivision for which water shall be available.

2. There is attached hereto a copy of the said public notice for the year 1911, together with said list, which notice and list are marked "Exhibit A."

3. Whenever an application is made for water under the said public notice said application is under the regulations of the department submitted to the project engineer for advice as to engineering details for the following matters:

13 (a) Whether or not the land described is subject to water-right application under the project.

(b) Whether or not the irrigable acreage shown is correct in accordance with said public notice, the official plats and instructions approved by the Secretary of the Interior.

(c) Whether or not the number of acre-feet to be furnished is correctly stated.

(d) Whether or not the amount of the building charge is correctly stated; and

(e) Whether or not the number of annual installments is correctly stated.

4. If the advice received from the project engineer is satisfactory and said application meets with other requirements of the reclamation act, the said application is approved for the amount of water shown by the list accompanying the said public notice for the subdivision for which application is made.

5. After said application has been approved and the amounts thereunder have been paid a certificate of filing water-right application is supplied to the project engineer of the Sunnyside unit, which certificate shows the amount of land ultimately irrigable and the amount of land irrigable for the current year, and said project engineer is also supplied with a copy of the receipt showing the amount of money paid by the applicant on his water-right application.

6. There is attached hereto a copy of certificate, serial No. 03219, supplied to the project engineer in the case of D. P. Baker, which certificate shows the ultimate area of irrigable land in that portion of the southeast quarter of section 2, township 10 14 north, range 21, E. W. M., lying below the main canal to be 62 acres, with the number of acres irrigable for 1909 and up to and including 1911 as 31 acres. The said certificate of filing is marked "Exhibit B."

7. Under the public notice as now issued the amount of water available under the orders of the Secretary of the Interior for that portion of the southeast quarter of section 2, twp. 10 N., range 21, lying below the main canal is 31 acres.

(Sg.) HARRY Y. SAINT, *Register.*
(Sg.) A. C. STEINMAN, *Receiver.*

Subscribed and sworn to before me this 23d day of June, 1911.

[NOTARIAL SEAL.] (Sg.) N. K. BUCK,
Notary Public in and for the State of Washington,
Residing at North Yakima.

(Sheet 4.)

EXHIBIT "A."

Sunnyside unit, Yakima project, Washington.

DEPARTMENT OF THE INTERIOR,
Washington, March 15, 1911.

Public notice.

1. Notice is hereby given that water will be furnished from the Sunnyside unit, Yakima project, under the provisions of the reclamation act of June 17, 1902 (32 Stat., 388), for the irrigable land shown on the following amended township plats, viz: Willamette meridian—T. 11 N., R. 20 E.; T. 10 N., R. 21 E.; T. 11 N., R.

15 21 E.; T. 8 N., R. 22 E.; T. 9 N., R. 22 E.; T. 10 N., R. 22 E.; T. 8 N., R. 23 E.; T. 9 N., R. 23 E.; T. 10 N., R. 23 E.; T. 8 N., R. 24 E.; T. 9 N., R. 24 E.; T. 9 N., R. 25 E.—approved February 28, 1911, and on file in the local land office at North Yakima, Washington.

2. A supplemental list has been filed in the local land office showing, in separate columns, for each legal subdivision or farm unit, the area opened to irrigation in 1909, 1910, and 1911, and the additional lands for which water will be furnished in 1912 and subsequent years will be shown by further supplemental lists to be duly filed with the local land office at North Yakima, Washington.

3. Homestead entries, applications for water rights, the charges, time, and manner of payments, shall be governed by the terms of the public notices of November 18, 1908, and March 2, 1909, and public notices and orders amendatory thereof or supplementary thereto, except that for lands in private ownership and for lands heretofore entered the first installment of charges for building, operation, and maintenances shall become due on March 1st of the year in which water shall be available for said lands, as shown upon supplemental list or lists hereinbefore referred to, and in all cases subsequent installments shall be due March first of each year thereafter until fully paid.

16 4. Water-right applications covering irrigable land shown on the above township plats in the local land office at North Yakima, Washington, filed in any year subsequent to that in which water shall be announced as available for the same, must be accompanied by payment of all installments for building, operation, and maintenance which have become due and remain unpaid for prior years, or which would have become due had water-right application been made as soon as water became available; and prior notices and orders are hereby amended to that effect, so far as they may affect any entries or water-right application hereafter made for irrigable lands in said unit.

FRANK PIERCE,
Acting Secretary of the Interior.

EXHIBIT "B."

Amended application. Irrigable area 1909, 31 acres. Department of the Interior. Certificate of filing water-right application. Act June 17, 1902 (32 Stat., 388), Sunnyside project. Serial No. 03219.

U. S. LAND OFFICE,
NORTH YAKIMA, WASHINGTON,
June 15, 1911.

This to certify that pursuant to the provisions of the act of June 17, 1902 (32 Stat., 388), D. P. Baker, of Granger, Washington, has filed application for water right (Form 4–020) for that portion

of SE. ¼ lying below main canal, section 2, township 10 N.,
17 range 21, E. W. meridian, containing 62 acres of irrigable land.

Now, therefore, be it known that, on presentation of this certificate to the engineer of the U. S. Reclamation Service in charge of the Sunnyside project, the said applicant shall be entitled to receive, subject to the payment of the annual charges for building, operation, and maintenance, three acre-feet of water per annum per acre of irrigable land herein described, or so much thereof as shall constitute the proportionate share per acre from the water supply actually available for the lands under said project; provided, that the supply furnished shall be limited to the amount of water beneficially used on said irrigable land.

(Sg.) HARRY Y. SAINT, *Register.*

(Endorsements:) Affidavit H. Y. Saint and A. G. Steinman.

Filed June 29, 1911.

FRANK C. NASH, *Clerk.*
By EDWARD E. CLEAVER, *Deputy Clerk.*

In the Circuit Court of the United States for the Eastern District of Washington, Southern Division.

D. P. BAKER, COMPLAINANT,
vs.
CHAS. H. SWIGART, E. MCCULLOH, AND R. K. TIFFANY, RESPONDENTS.

18 AFFIDAVIT.

UNITED STATES OF AMERICA,
Eastern District of Washington, County of Yakima, ss:

Chas. H. Swigart, being first duly sworn on his oath deposes and says:

That he is the duly appointed, qualified, and acting supervising engineer of the Reclamation Service of the United States and in charge of the Washington district, which includes the Sunnyside unit of the Yakima project, lying in Yakima and Benton Counties, State of Washington.

That under the regulations of the United States Reclamation Service the method of supplying water to lands under the said Sunnyside unit is as follows:

1. A report and recommendation is made by the project engineer, which is accompanied by a list of the lands for which, in the opinion of the project engineer, water will be available.

2. The above-mentioned report and recommendation is examined and approved by the supervising engineer and forwarded to the

office of the Director of the United States Reclamation Service at Washington, D. C.

3. The director approves the said report and recommendation and forwards same to the Secretary of the Interior.

4. The Secretary of the Interior issues a public notice, which public notice for the year 1911 is attached hereto and marked "Exhibit A." This public notice, together with the list accompanying the same, is then forwarded to the General Land Office and the local land office.

19 5. Applications are then receivable, which applications must be for the entire ultimate irrigable acreage of the applicant. A copy of the application of D. P. Baker is attached hereto and marked "Exhibit B."

6. This application, if in proper form and complying with all regulations, is approved subject to the list accompanying the Secretary's public notice; that is, such application is approved for such amount of land as is shown by said list to be entitled to a supply of water.

7. Amendments to the said public notice or the list accompanying the same are made annually upon suitable recommendation by the project engineer, which recommendation is acted upon by the supervising engineer, the director, and the Secretary of the Interior in the same manner as outlined above.

8. Under the said public notice and list for 1911 there is in the southwest quarter of the southeast quarter of section 2, township 10 north, range 21, E. W. M., 14 acres, and in the southeast quarter of the southeast quarter of said section 2, 17 acres, making a total of 31 acres for which water was available in the said southeast quarter of section 2, twp. 10 N., R. 21, E. W. M., for the year 1909 and years subsequent thereto.

9. There are therefore to the best of my knowledge and belief 31 acres of land for which water is available and to which water has been apportioned under the present regulations of the United States Reclamation Service for the southeast quarter of section 2, twp. 10 N., R. 21, E. W. M., and no water can be made available during the year 1911 to other lands in said southeast quarter of sec. 2, twp. 10 N., R. 21, E. W. M., except as hereinafter mentioned by means

20 of so-called "rental contracts."

10. The said recommendations of the project engineer showing lands for which water is available as approved by the supervising engineer are based on a careful study of the obligations to deliver water already incurred by the United States through contract, water-right applications, or otherwise, the water which will be available for use, and the capacity of the canals and distribution systems through which such water is to be delivered, and said recommendations cover only so much land as such study indicates can be irrigated from the water which will be available after prior obligations have been met.

11. After the issuance of public notice and after the opportunity has been given to water-right applicants to perfect their applications,

it has frequently been found that a small amount of water was available for such temporary use as might seem best to the officers of the Reclamation Service.

12. Under date of March 29, 1909, the affiant made recommendation and requested authority to dispose of the excess water mentioned in paragraph No. 11 above, by means of temporary rental contracts, a copy of which request and recommendation is attached hereto and marked "Exhibit C." The above recommendation was made to the director of the United States Reclamation Service and authority was obtained as recommended by telegram from the said director under date of April 6, 1909. This authority has been extended for subsequent years by informal authorization of the said director. For the year 1911 authority is shown on copy of letter from said
21 director, attached hereto and marked "Exhibit D."

13. Under date of November 18, 1908, a public notice was issued by the Secretary of the Interior, which, among other things, fixed the charge for operation and maintenance under the Sunnyside unit for 1909, and until further notice, at 95 cents per acre. A copy of this notice is attached hereto and marked "Exhibit E." The said notice has not been abrogated, modified, or changed in so far as paragraph No. 2 of said notice is concerned, and the said paragraph and the amount of maintenance fee therein fixed are and at all times since its promulgation have been in full force and effect.

(Sg.) CHAS. H. SWIGART.

Subscribed and sworn to before me this 24th day of June, 1911.

[NOTARIAL SEAL.] (Sg.) N. K. BUCK,
Notary Public in and for the State of Washington,
Residing at North Yakima.

(Sheet 4.)

EXHIBIT "A."

Sunnyside unit, Yakima p'oject, Washington.

DEPARTMENT OF THE INTERIOR,
Washington, March 15, 1911.

Public notice.

1. Notice is hereby given that water will be furnished from the Sunnyside unit, Yakima project, under the provisions of the reclamation act of June 17, 1902 (32 Stat., 388), for the irrigable land shown on the following amended township plats, viz,
22 Willamette Meridian—T. 11 N., R. 20 E.; T. 10 N., R. 21 E.; T. 11 N., R. 21 E.; T. 8 N., R. 22 E.; T. 9 N., R. 22 E.; T. 10 N., R. 22 E.; T. 8 N., R. 23 E.; T. 9 N., R. 23 E.; T. 10 N., R. 23 E.; T. 8 N., R. 24 E.; T. 9 N., R. 24 E.; T. 9 N., R. 25 E.—approved February 28, 1911, and on file in the local land office at North Yakima, Washington.

2. A supplemental list has been filed in the local land office showing, in separate columns, for each legal subdivision or farm unit, the area opened to irrigation in 1909, 1910, and 1911, and the additional lands for which water will be furnished in 1912 and subsequent years will be shown by further supplemental lists to be duly filed with the local land office at North Yakima, Washington.

3. Homestead entries, applications for water rights, the charges, time and manner of payments shall be governed by the terms of the public notices of November 18, 1908, and March 2, 1909, and public notices and orders amendatory thereof or supplementary thereto, except that for lands in private ownership and for lands heretofore entered the first installment of charges for building, operation, and maintenances shall become due on March 1st of the year in which water shall be available for said lands as shown upon
23 supplemental list or lists hereinbefore referred to, and in all cases subsequent installments shall be due March first of each year thereafter until fully paid.

4. Water-right applications covering irrigable lands shown on the above township plats in the local land office at North Yakima, Washington, filed in any year subsequent to that in which water shall be announced as available for the same, must be accompanied by payment of all installments for building, operation, and maintenance which have become due and remain unpaid for prior years, or which would have become due had water-right application been made as soon as water became available; and prior notices and orders are hereby amended to that effect, so far as they may affect any entries or water-right applications hereafter made for irrigable lands in said unit.

FRANK PIERCE,
Acting Secretary of the Interior.

EXHIBIT B.

Amended application 03219. Lands in private ownership. Application No. —— water right, Sunnyside project, Wash. Act of June 17, 1902 (32 Stat., 388).

DEPARTMENT OF THE INTERIOR,
LAND OFFICE AT NO. YAKIMA,
May 22, 1911.

I, D. P. Baker, do hereby apply for a water right under the ——— project, subject to the provisions of the act of Congress approved June 17, 1902 (32 Stat., 388), known as the reclamation act, and the rules and regulations established thereunder, the water
24 supplied in pursuance thereof to be used for the irrigation of, and to be appurtenant to, 62 acres of irrigable land, as shown on plats on file in this office approved by the Secretary of the Interior, within the area described as follows:

That portion of SE. ¼, lying below main canal, section 2, township 10, range 21 E., W. meridian, an area of 62 acres.

The amount of water to be furnished hereunder shall be 3 acre-feet of water per annum per acre of irrigable land, as aforesaid, measured at the land; or so much thereof as shall constitute the proportionate share per acre from the water supply actually available for the lands under said project: Provided, That the supply furnished shall be limited to the amount of water beneficially used on said irrigable land.

I agree to pay for said water right the estimated cost of construction as fixed by the Secretary of the Interior, namely, the sum of $52 per acre for the said area of irrigable land, in 10 annual installments, and to pay promptly when due the annual installments and the maintenance and operating charges duly assessed against said land on account of said water right.

I further agree that upon my failure to comply with the terms of said reclamation act and the regulations thereunder, this application shall be subject to cancellation by the Secretary of the Interior, with the forfeiture of all rights acquired thereunder and of all payments made thereon.

This application must bear the certificate, as hereto attached, of the water users' association under this project, which has entered into contract with the Secretary of the Interior.

25 If the Secretary of the Interior has made no contract with a water users' association under this project, I agree to file, upon his direction, evidence of membership in the water users' association organized under the said project; in default of which, this application shall be subject to cancelation by the Secretary of the Interior, with the forfeiture of all rights acquired thereunder and of all payments made thereon.

And, being duly sworn, I further depose and say that my post-office address is Granger, Wash.; that I am a bona fide resident upon said land; that I hold the following interest in the said tract: Title fee simple, as duly shown upon the records of Yakima County, Wash.; that I have made no other application, now uncanceled, for a water right under said act of Congress, appurtenant to land now owned or claimed by me, except as follows: Application No. ——, ——— project, ———, of ———, for same land, section ———, township ———, range ———, ——— meridian, an area of —— acres and containing —— acres of irrigable land, as determined by the Secretary of the Interior; and that the present application is made in my own behalf and not at the instance or for the benefit of any other person or any association or corporation, either directly or indirectly.

It is further understood and agreed that if the interest of the applicant in said land shall cease and said interest shall be held by a party who is not qualified to apply for or hold a water right under the provisions of the reclamation act, this application shall be subject to cancellation by the Secretary of the Interior, with the for-

26 feiture of all rights acquired thereunder and of all payments made thereon.

It is further understood and agreed that the evidence of ownership of this water right shall not be issued by the United States unless fee simple title to said land is vested in me at the time when final payment hereon is due, in default of which this application shall be subject to cancelation by the Secretary of the Interior, with the forfeiture of all rights thereunder and of all moneys paid thereon.

D. P. BAKER, *Applicant.*

STATE OF WASH.,
County of Yakima, ss:

Subscribed and sworn to before me this 22nd day of May, 1911.

[SEAL.] A. W. SWIGERT,
Notary Public in and for the State of Washington, residing at Sunnyside.

My commission expires ————.

(This affidavit may be sworn to by any officer authorized to administer an oath.)

If the Secretary of the Interior has entered into a contract with a water users' association under the project the following certificate must be filled out:

MAY 22, 1911.

I hereby certify that the applicant for this water right has duly subscribed for the stock of this association for the lands described herein, and that all assessments levied against said stock by
27 said association have been fully paid up to date.

A. W. SWIGERT,
Secretary Sunnyside Water Users' Association.

[CORPORATE SEAL.]

Approved May 26, 1911. Plat attached.

F. MCCULLOH, *Project Engineer.*

EXHIBIT C.

Watering lands outside 1909 units. Sunnyside, CHS-KJR.

NORTH YAKIMA, WASH., *March 29, 1909.*

The DIRECTOR U. S. RECLAMATION SERVICE,
Washington, D. C.

DEAR SIR: In numerous reports on complaints made by residents on the Sunnyside project who had prepared to irrigate their holdings this season without first ascertaining whether they could get water and who are outside of the units opened by the Secretary of the Interior for water during 1909, the statement was made that at the earliest possible date recommendation would be made covering the furnishing of water to the most deserving cases under the Sunnyside project so as to prevent loss, if possible, also that it was the policy of the local administration of the Reclamation Service to furnish water to such lands whenever possible In accordance with this statement I hand you herewith copy of a letter from Mr. W. N.

Granger, irrigation manager, in which he discusses the amount of surplus water which he believes will be available in the light of present knowledge, and makes certain suggestions.

28 As you will note, Mr. Granger is satisfied that a considerable area of land within the units already opened to water-right applications will not take water this year.

As is also stated in Mr. Granger's letter and in the reports referred to above, there are a number of cases where people are ready for water, or are preparing to receive it by clearing, plowing, and leveling their land, and in many cases have actually set out fruit trees, to whom, if possible, it is desired to furnish water this season so as to save them from serious loss. Owing to the dryness of the season, this water must be furnished at an early date. It has been impossible, at an earlier date, to make any reliable estimate of the amount of land to which we were obligated to furnish water which would demand water this season, therefore, I would request that this be given immediate consideration.

This situation arises thru no fault on the part of the officers of the Reclamation Service, but entirely thru the negligence of the individuals themselves, it having been repeatedly stated to people renting water that each application must be considered at the time of its receipt and decision as to whether water could be furnished or not made at such time; that the Government was not generally holding out to the people that it would rent water to all applicants, but that the renting of water, under any circumstances, was resorted to as an accommodation to the water users in special cases; nevertheless we desire, if possible, to save these people from loss.

The present cases may be placed in two classes: Class 1, those who have heretofore rented water and who, during the fall pre-

29 pared additional land for irrigation. Class 2, those who have never rented water but who have prepared land for irrigation.

I desire to recommend that water be furnished these lands in the following manner respectively:

Class 1. That an amended list, which will be forwarded to your office at once, showing the additional lands to be watered in 1909 under Secretary's notice of March 2, 1909, be furnished the local land office with such instruction as will allow us to furnish water to these lands during 1909, under the water-right application made in pursuance of Secretary's notice of March 2, 1909.

Class 2. That authority be given which will allow water to be rented to these lands during the present season, subject to the following conditions:

1. That the charge per acre shall be $2.50, payable in advance upon the execution of the regular form of water rental contract.

2. That the only water that may be rented is the surplus over and above that necessary to meet the obligations already incurred by the United States; that the maximum number of acres for which water can be rented this season, in any case, be now limited to 500.

3. That water will be rented to no individual unless he has prepared his land for irrigation or will suffer material financial loss,

other than the mere value of a crop, if water is not furnished this year.

4. That definite announcement be now made by the Secretary of the Interior that hereafter no lands will be able to obtain water except upon announcement by the Secretary of the Interior that such lands are open to water-right application and water is available for them under the terms of the reclamation act.

I would request that specific instructions, embodying the above conditions, be issued at as early a date as possible.

Respectfully,

CHAS. H. SWIGART,
Supervising Engineer.

(Enc.)
Copy to Mr. Granger.

EXHIBIT D.

DEPARTMENT OF THE INTERIOR,
UNITED STATES RECLAMATION SERVICE,
Washington, D. C., March 31, 1911.

SUPERVISING ENGINEER,
U. S. Reclamation Service, North Yakima, Washington.

DEAR SIR: Your letter of March 22, 1911, received recommending that a number of tracts be added to the list for which water will be furnished in 1911. In view of the fact that the list requires amendment by the addition of lands in T. 11 N., R. 20 E., which was omitted by mistake in the list accompanying the public notice of March 15, the desired addition will be made of lands to be irrigated in 1911.

In case further areas become irrigable this year, it is suggested that you supply them on a rental basis instead of by filing an amendatory list.

In the opinion of this office, one supplementary list only should be filed each year and all areas coming in later should be furnished on a rental basis.

Very truly, yours, (Sg.) F. H. NEWELL,
Director.

Copy to P. E., Sunnyside, Wash.

EXHIBIT E.

Sunnyside project, Washington.

DEPARTMENT OF INTERIOR,
Washington, November 18, 1908.

Public notice.

In pursuance of the provisions of section 4 of the reclamation act of June 17, 1902 (32 Stat., 388), notice is hereby given as follows:

Water will be furnished from the Sunnyside project, Washington, under the provisions of the reclamation act, in the irrigation season

of 1909, for the irrigable land shown on farm units of Willamette meridian—township 8 north, range 22 east; township 8 north, range 23 east; township 9 north, range 24 east; township 9 north, range 25 east—approved November 12, 1908, by the Secretary of the Interior and on file in the local land office at North Yakima, Washington.

Homestead entries, accompanied by applications for water rights and the first installment of the building and operation and maintenance charges, may be made under the provisions of said act for the farm units shown on said plats. Water-right applications may also be made for lands heretofore entered and for lands in private ownership, and the time when payments will be due therefor is hereinafter stated.

The limit of area per entry representing the acreage which, in the opinion of the Secretary of the Interior, may be reasonably required for the support of a family on the lands entered subject to the
32 provisions of the reclamation act, is fixed at the amounts shown upon the plats for the several farm units.

The charges which shall be made per acre of irrigable land in the said entries and for lands heretofore entered or in private ownership which can be irrigated by the waters from the said irrigation project are in two parts as follows:

1. The building of the irrigation system, $52 per acre of irrigable land, payable in not more than ten annual installments, each payment not less than $5.20 per acre or some multiple thereof, provided, however, that full payment may be made at any time of any balance remaining due, after certification has been made by the Commissioner of the General Land Office that full and satisfactory compliance has been shown with all the requirements of the law as to residence, cultivation, and reclamation.

2. For operation and maintenance, which will, as soon as the data are available, be fixed in proportion to the amount of water used, with a minimum charge per acre of irrigable land whether water is used thereon or not. The operation and maintenance charge for the irrigation season of 1909 and until further notice will be 95 cents per acre of irrigable land, whether water is used thereon or not.

For lands hereafter entered the first installment on account of the said charges for the irrigable lands shown on these plats shall be paid for the season of 1909 at the local land office at North Yakima, Washington, at the time of entry and of filing water-right application, the total payment being not less than $6.15 per acre.
33 The second instalment shall be due and payable March 1, 1910, at the same place. Subsequent installments shall be due and payable on March 1 of each year at the same place.

For lands in private ownership and for lands heretofore entered the first instalment shall be due and payable March 1, 1909, and the instalments for the year 1910 and subsequent years shall be due and payable on the same date and at the same place.

The first instalment of the charges for all irrigable areas shown on these plats, whether or not water-right application is made therefor

or water is used thereon, shall be due and payable as herein provided.

The regulation is hereby established that no water will be furnished in any year until all operation and maintenance charges then due shall have been paid. Accordingly no water will be furnished for the irrigation season of 1909 for any lands unless the portion of the instalment for operation and maintenance due and payable on or before March 1, 1909, has been paid on or before that date, and in like manner no water will be furnished in any subsequent irrigation season unless payment has been made on or before March 1 of that year of the portion of the instalment for operation and maintenance which was at that time due and payable.

For all applications for water rights filed after June 15 in 1909, or any subsequent year, one instalment of the charge for building, operation, and maintenance, $6.15 per acre, must be paid at the time of filing, but the portion of the instalment for operation and maintenance shall be credited on account of the instalment of said charges for the subsequent year.

34 If any instalment of the charges shall not have been paid in full on or before March 1 of the year subsequent to that in which it is due and payable as herein provided, it shall then become delinquent, and under the terms of section 5 of the reclamation act the entry and water-right application shall be subject to cancellation with the forfeiture of any moneys paid thereon.

The charges herein provided for may for the convenience of applicants be paid to the special fiscal agent of the U. S. Reclamation Service assigned to the Sunnyside project for transmission to the registers and receivers of the local land offices on or before the date specified for payment at the local land offices, but in case this privilege is availed of the necessary charges for transportation of the cash, as determined by the special fiscal agent, must accompany the payment of the water-right charges.

JAMES RUDOLPH GARFIELD,
Secretary of the Interior.

Instructions accompanying public notice.

The notice was forwarded to the General Land Office for transmission to the local land office at North Yakima, Washington, with instructions for conforming to the farm unit the homestead entries made or to be made under the provisions of the reclamation act; that the local officers give publicity to the notice and announce that water-right applications must be filed in the proper form in the local land office before water will be furnished; that the United States will maintain and operate the storage and diversion works and main canals as shown on a plat of the project approved by the Di-

35 rector of the Reclamation Service, a copy of which is on file with the engineer in charge of the project, the same to be sub-

ject to amendment and extension from time to time, as may be found necessary; that the amount of water to be furnished is 3 acre-feet per acre per annum; that the building charge and number of annual instalments are to be stated in the third paragraph of each application; that the limit of distance to be regarded as residence in the neighborhood has been fixed at 50 miles; and that the Secretary of the Interior has entered into a contract with the Sunnyside Water Users' Association, and the certificate of that association forming part of the water-right application must be filled in before the application can be accepted.

(Amended by G. L. O. letter "K," March 16, 1909.)

(Endorsements:) Affidavit of Charles H. Swigart.

Filed June 29, 1911.

FRANK C. NASH, *Clerk*,
By EDWARD E. CLEAVER, *Deputy Clerk*.

In the Circuit Court of the United States for the Eastern District of Washington, Southern Division.

D. P. BAKER, COMPLAINANT, *vs.* CHAS. H. SWIGART, E. MCCOLLOH, AND R. K. TIFFANY, respondents.	No. 76.

AMENDED BILL OF COMPLAINT.

To the honorable judges of the Circuit Court of the United States for the Eastern District of Washington, Southern Division:

36 D. P. Baker, a citizen of the State of Washington, residing at Yakima County, in said State, brings this his bill against Chas. H. Swigart, E. McCulloh, and R. K. Tiffany, citizens of the State of Washington, residing at Yakima County, in said State, and, therefore, your orator complains and says:

I.

During all the times herein mentioned your orator has been and now is a citizen of the eastern district of the State of Washington, residing at the county of Yakima, in said State, and the said respondents, Chas. H. Swigart, E. McColloh, and R. K. Tiffany, and each of them, are and during all of the times herein mentioned have been citizens of the eastern district of the State of Washington, residing at Yakima County, in the State of Washington.

II.

Your orator, being then and there the owner of and entitled to the possession under the laws of the United States, and of the State of Washington, of the land hereinafter described, made application at the office of the Land Department of the United States at North

Yakima, State of Washington, for a water right under the Sunnyside unit of the Yakima project, the same being a project of the United States Reclamation Service, under the provisions of the act of Congress entitled, "An act appropriating the receipts from the sale and disposal of public lands in certain States and Territories to the construction of irrigation works for the reclamation of arid lands," approved June 17, 1902, which said act is known as, and is hereinafter referred to as, the reclamation act. Said application was
37 made for the use of water for the irrigation of and to be appurtenant to thirty-one acres of irrigable land, being a portion of the southeast quarter (SE. ¼) of section 2, in township 10, north of range 21, in Yakima County, State of Washington, the said application being for three acre-feet of water per acre per annum of the aforesaid land, said amount of water to be used beneficially on said land; and your orator did have attached to said application the certificate of the waterusers' association under said project, which had entered into contract with the Secretary of the Interior, as hereinafter set forth. Your orator was at said time and at all times since has been a bona fide resident upon said land and an occupant thereof, and he made said application in his own behalf and not at the instance of nor for the benefit of any other person or association or corporation, either directly or indirectly, and in and by said application your orator did agree to pay for said water right the estimated cost of construction as fixed by the Secretary of the Interior under the reclamation act, viz, the sum of fifty-two ($52.00) dollars per acre for the said area of irrigable land, in annual instalments, the first instalment thereof to be due and payable on the first day of March, 1912. Said application was duly accepted by the officers of the Land Department of the United States at North Yakima, Washington, and was thereupon approved by the engineer of the Reclamation Service of the United States in charge of said project and by the Secretary of the Interior.

III.

At the time of the making of said application, said land here-
38 inbefore described was barren and waste and was and is of such a character as not to be tillable without the use of water thereon; that on the making of said application as aforesaid and its approval and acceptance by the officers of the United States as aforesaid, and in sole reliance upon the water to be furnished him under said application, your orator did plow, cultivate, and seed said land at great labor and expense to him, and did plant the same to grass; and thereupon there was furnished to your orator out of said Sunnyside ditch and the laterals connected therewith water to irrigate said lands, so that by the aid of said water so as aforesaid furnished under said application, and by the expenditure of time, labor, and money in the cultivation of said land, your orator has now upon said land a growing crop of alfalfa grass.

IV.

In order that said grass may be made to mature and if it is not to become dead and valueless it will be necessary that a sufficient amount of water be turned thereon to properly irrigate the same, and unless water is furnished therefor forthwith, the said grass will die and become valueless, to the great and irreparable loss of your orator. By reason of the season of the year it will be necessary that your orator have water to turn upon said land and irrigate the grass thereon at stated intervals in order to secure a maturity of his crop, and there is no other source from which your orator may obtain sufficient or any water to irrigate said land, or any portion thereof.

V.

Prior to June 13, 1911, these respondents, claiming to act
39 as officers of the Reclamation Service of the United States, but without warrant of law, did wrongfully make an assessment against your orator and the aforesaid land to the extent of ninety-five cents per acre for each acre of land so irrigated as aforesaid, and did thereupon demand that payment thereof be made to the receiver of the United States Land Office, at North Yakima, Washington.

VI.

Thereupon your orator did refuse to pay said assessment, so levied prior to June 13, 1911, or any part thereof, and thereupon these respondents claiming to act as engineers and officers of the Reclamation Service of the United States, under and by virtue of said reclamation act, but wrongfully and unlawfully, and without warrant of law, shut off the supply of water from the lands of your orator, and the whole thereof, and now threaten to continue to refuse to supply any water to the lands of your orator, and to prevent the diversion unto said lands of any water from said Sunnyside ditch, unless your orator will pay upon demand charges from time to time arbitrarily assessed against his said land as aforesaid.

VII.

And your orator alleges that said respondents, claiming to act as officers of the Reclamation Service of the United States, but without warrant of law, threaten from time to time to arbitrarily assess a charge against the lands of your orator as a pretended maintenance charge, but which said charge is arbitrarily fixed without regard to the actual cost of maintaining said ditch, and to attempt to collect the same, and if the same shall not be paid to them to deny to
40 your orator the use of water upon his said lands, and unless enjoined by order of this court will assess from time to time an arbitrary charge in the manner aforesaid against the lands of your

orator as a pretended charge for the maintenance of said ditch, and unless the same shall be forthwith paid as assessed will deprive your orator of the use of water upon his said lands.

VIII.

Prior to the making of the application by your orator as aforesaid there was organized under the laws of the State of Washington a corporation under the name and style of "Sunnyside Waterusers Association." The said corporation was empowered, amongst other things, to enter into an agreement with the proper representatives of the United States with reference to the collection and payment of any and all charges made under the Federal statutes for the work of providing water for the lands of its shareholders and to comply with the provisions of any Federal statutes applicable to the work by the United States in connection with the system of water supply known as the Sunnyside irrigation district, in which district is situate the lands of your orator hereinbefore described, and in the rules and regulations established thereunder; and prior to the making of the application for the water right hereinbefore set forth, your orator did become and now is a shareholder in said Sunnyside Waterusers' Association to the extent of more than thirty-one shares of the capital stock thereof.

IX.

On the 7th day of May, 1906, the United States of America,
41 acting in the behalf, by E. A. Hitchcock, Secretary of the Interior, as the party of the first part, and the said Sunnyside Waterusers' Asociation as the party of the second part, made and entered into an agreement, a copy of which is attached hereto, and which is expressly made a part hereof, and marked Exhibit "A."

X.

The said Sunnyside Waterusers' Association has adopted and now has subsisting and in force proper by-laws approved by the Secretary of the Interior, for the purpose of making and enforcing all collections authorized by law to be made of its shareholders on account of the use of water upon any of the lands subject to irrigation in said Sunnyside irrigation district, including the lands of your orator, and has been at all times and now is willing and ready to levy calls as may be required by the Secretary of the Interior, under the authority of said reclamation act, for the collection of any sum or sums authorized to be collected on account of the use of said water and to require prompt payment thereof, in such manner as the Secretary of the Interior may lawfully direct; but notwithstanding the premises, no opportunity has been given to the said Sunnyside Waterusers' Association to levy said calls or collect said sums, but these respondents unlawfully and without warrant of law and

in violation of the terms of said contract, assert the right to make such calls and collect any assessments that may be made by the said Secretary of the Interior, or under his direction or authority, without the intervention of said Sunnyside Waterusers' Association, and unlawfully, arbitrarily, and without warrant of law are as-
42 serting, and unless restrained by order of this court will continue to assert the right to deny to your orator and other waterusers the use of said water, or any part thereof, until said calls and assessments so unlawfully and arbitrarily made as aforesaid shall be paid.

XI.

In determining the cost of said project, and in determining the proportionate charge to be made for the water-right upon all the lands subject to irrigation by said project, including the lands of your orator, there was included in such estimate, in addition to the actual cost of irrigation and construction of said project, a charge of ten dollars ($10.00) per acre upon all lands subject to irrigation by said project (save and except certain lands at said time in a private ownership), which charge was included so as to cover the cost of the operation and maintenance of said works for a period of ten years.

XII.

Your orator does further allege that these respondents are claiming to act as officers of the Reclamation Service of the United States, and under and by virtue of the provisions of the laws of the United States, and more particularly the act of Congress hereinbefore referred to as the reclamation act.

XIII.

Unless said respondents are required by order of the court to forthwith cease and to forthwith refrain from refusing to give to your orator waters out of said Sunnyside ditch as covered by the application of your orator hereinbefore referred to, the crops upon the lands of your orator hereinbefore described will be de-
43 stroyed, and said lands will be laid valueless, to the damage of your orator in a sum which your orator is not able to state with exactness, but alleges to be in excess of the sum of five thousand dollars ($5,000). And your orator does further allege that an emergency exists in this, to wit, that if notice be required to be given of a hearing for an application for a temporary injunction herein, the crops upon said land, and especially the setting of alfalfa grass thereon, will become dry and barren, pending the hearing upon said application, and it is necessary, in order to preserve your orator from irreparable loss that a temporary restraining order be issued herein pending a hearing for an application for a temporary injunction.

XIV.

Your orator does further aver that he is remediless at law, and that no plain, adequate or speedy remedy may be afforded him save in a tribunal exercising chancery power.

XV.

Your orator does further allege that this suit arises under the laws of the United States, and involves the construction thereof, and that the amount or value of the matter in dispute exceeds the sum of two thousand ($2,000) dollars, exclusive of interest and costs.

In consideration whereof, and inasmuch as your orator can have no adequate relief except in this court, and to the end therefore that the respondents may, if they can, show why your orator should not have the relief prayed for, and may make a full disclosure and
44 discovery of all the matters aforesaid, and according to the best and utmost of their remembrance, knowledge, information, and belief, full, true, direct, and perfect answer make to the matters hereinbefore stated and charged, but not under oath, an answer under oath being expressly waived.

And your orator prays that your honor may, pending the determination of this action, grant a temporary injunction commanding these respondents, and each of them, and all or any of their agents, servants, or employees, to desist from attempting to assess against your orator, or his lands, any charge for the maintenance of said ditch, and to desist from diverting the waters of said Sunnyside ditch from the lands of your orator, or any portion thereof, and commanding said respondents to forthwith permit to flow upon said lands as heretofore described, the amount of water covered by the application of your orator herein in this bill referred to, and that upon final hearing, such injunctive order may be made permanent.

And your orator does further pray that inasmuch as an emergency exists, a temporary restraining order be issued pending a hearing upon said application for a temporary injunction, commanding the respondents, and each of them, and all their servants, agents, and employees to desist from diverting the waters of said Sunnyside ditch from the lands of your orator, commanding them to permit said waters to flow upon the lands of your orator to the extent specified in said application hereinbefore referred to.

May it pleasure your honor to grant unto your orator a writ of subpœna to the said Chas. H. Swigart, E. McCulloh, and
45 R. K. Tiffany, and to such others as shall in the discretion of your honor appear necessary for the hearing and determination of said cause, commanding them on a day certain to appear and answer unto this bill of complaint, and to abide and perform such order and decree in the premises as to the court shall seem proper and required by the principles of equity and good conscience.

(Signed) HUGHES, MCMICKEN, DOVELL & RAMSEY,
Solicitors for Complainant.

UNITED STATES OF AMERICA,
Eastern District of Washington, ss:

W. T. Dovell, being first duly sworn, upon oath deposes and says: That he is one of the solicitors for the complainant in the above-entitled action; that he has read the foregoing amended bill of complaint, knows the contents thereof, and believes the same to be true; and that he makes this verification for and on behalf of said complainant for the reason that the said complainant is absent from the State of Washington.

W. T. DOVELL.

Subscribed and sworn to before me this 14th day of July, A. D. 1911.

[NOTARIAL SEAL.] (Sg.) H. A. OWEN, Jr.,
Notary Public in and for the State of Washington, residing at Seattle.

EXHIBIT "A."

These articles of agreement, made and entered into this 7th day of May, 1906, by and between the United States of America, acting in the behalf of E. A. Hitch-'ock, Secretary of the Interior,
46 party of the first part, and the Sunnyside Water Users' Association, a corporation, duly organized and existing under the laws of the State of Washington, party of the second part, their successors and assigns, witnesseth:

That whereas the Sunnyside Water Users' Association is a corporation organized and existing under the laws of the State of Washington for the purposes mentioned in its articles of incorporation and by-laws, a copy of which is appended to this agreement, and is, for every purpose of the interpretation, construction, and consideration of this agreement and of the rights of the parties hereunder, to be deemed, held, read, and considered as if fully written out or printed herein and deemed a part thereof; and

Whereas the land embraced within the area proposed to be irrigated, as described in said articles of incorporation or by-laws, are naturally desert and arid and incapable of proper cultivation without irrigation, and will to a greater or less extent remain unclaimed, unfit for habitation, and uncultivated, in which condition they, or a great part thereof, now are, unless the water in the Yakima River, in the State of Washington, and its tributaries be impounded and the flow thereof otherwise regulated and controlled; and

Whereas the Secretary of the Interior contemplates the construction of certain irrigation works under the provision of the act of Congress entitled "An act appropriating the receipts from the sale and disposal of public lands in certain States and Territories to the construction of irrigation works for the reclamation of arid
47 lands," approved June 17th, 1902, for the irrigation and reclamation of the lands described in the said articles or by-laws; and

Whereas the incorporators and shareholders of the Sunnyside Water Users' Association, and under the provisions of its articles of incorporation and by-laws, must be owners and occupants of land in said area, and in some cases are appropriators of water for the irrigation thereof, and in addition thereto such incorporators and shareholders and their successors or assigns must initiate rights to the use of water from the said proposed irrigation works, to be constructed by the Secretary of the Interior as soon as such rights may be initiated, and thereafter complete the acquisition thereof in the manner and upon the terms and conditions to be prescribed therefor by the Secretary of the Interior, which rights shall be, and thereafter continue to be, forever appurtenant to designated lands owned by such shareholders; and

Whereas neither the relative priority nor the extent of the individual appropriations of such water heretofore made by said incorporators and shareholders for the lands described in said articles and by-laws, and which are now vested rights, have been ascertained or determined, but said incorporators and shareholders have agreed among themselves, by the terms of said articles of incorporation and by-laws, upon the rules and principles by and upon the relative priority and the extent of their several appropriations and vested rights to the use of such water shall be determined;

Now, therefore, it is agreed and understood by and between the parties hereto:

48 1. That if the Secretary of the Interior shall authorize and cause the construction of said irrigation works, the said association shall take prompt action to secure the determination by the courts of the relative rights of its shareholders to the use of water for said lands, and that in the determination of such rights and of their respective rights to the use of water acquired under said act of Congress the rules and principles set out in said articles of incorporation and by-laws, for such determination, shall be deemed the established rules and principles for the purpose.

2. That only those who are or who may become members of the said association under the provisions of its articles of incorporation and by-laws shall be accepted as applicants for rights to the use of the water available by means of said proposed irrigation works.

3. That the aggregate amount of such rights to be issued shall, in no event, exceed the number of acres of land capable of irrigation by the total amount of water available for the purpose, being (1) the amount now appropriated by the shareholders of the said association, and (2) the amount to be delivered from all sources in excess of the water now appropriated; and that the Secretary of the Interior shall determine the number of acres so capable of such irrigation as aforesaid, his determination to be made upon due and expert consideration of all available data, and to be based upon and measured and limited by the beneficial use of water.

4. That the payment for the water rights to be issued to the shareholders of said association, under the provisions of said act of Con-

gress, shall be divided into not less than ten annual payments,
49 the first of which shall be payable when the water is first
delivered from the works, or within a reasonable time thereafter, and after due notice thereof by the Secretary of the Interior to the association, and that the cost of the said proposed irrigation works shall be apportioned equally per acre among those acquiring such rights.

5. That the said Water Users' Association hereby guarantees the payments for that part of the cost of the irrigation works which shall be apportioned by the Secretary of the Interior to shareholders, and will promptly levy calls or assessments therefor and for the cost of the maintenance and operation as may be assessed from year to year by the Secretary of the Interior and collect or require prompt payment therefor in such a manner as the Secretary of the Interior may direct; that it will promptly pay the sums collected by it to the receiver of the local land office of the district in which said land is situated, that it will promptly employ the means provided and authorized by the said articles of incorporation or by-laws for the enforcement of such collections, and will not change, alter, or amend its articles of incorporation and by-laws in any manner whereby such means of collection, or the lien given to it by the shareholders to secure payment thereof, or of any assessment contemplated or authorized thereby, shall be impaired, diminished, or rendered less effective, without the consent of the Secretary of the Interior.

6. That the United States shall in no manner be responsible for the sums collected by said association until they have been paid into
the hands of the receiver of the local land office as provided
50 by law, and in accordance with such regulations as may be
prescribed by the Secretary of the Interior.

7. That for the purpose of enforcing said collections the association will adopt and enforce proper by-laws subject to the approval of the Secretary of the Interior and not change them so as to in any wise impair the efficiency for said purpose, and will otherwise do any and all things it is authorized and empowered to do in the premises.

8. That the association shall adopt and enforce such rules and regulations as it is authorized by its articles of incorporation and by-laws to adopt and enforce concerning the use of water by its shareholders and concerning the administration of the affairs of the association, to effectually carry out and promote the purposes of its organization, within the provisions of said articles of incorporation and by-laws, which rules and regulations shall be subject to the approval of the Secretary of the Interior, and that if the association shall fail to make and adopt such rules and regulations, then the Secretary of the Interior may prescribe them, but in such event the Secretary of the Interior shall impose no rule or regulation interfering with any vested right of the shareholders of the association, as defined or modified by said articles of incorporation and by-laws.

9. That persons who are not now members of the association, but who may be the owners or occupants of land to be irrigated, as de-

scribed in its articles of incorporation and by-laws, or of added lands as therein provided for, and to whom rights in the use of water
51 from the proposed irrigation works may be issued by the United States, may at the designation of the Secretary of the Interior, become members of the association upon subscribing to the stock thereof and upon compliance with the other conditions prescribed for such membership.

10. That in all of the relations between the United States and this association and the members of the association, the right of the members of the association to the use of water where the same have vested are to be defined, determined, and enjoyed in accordance with the provisions of the said act of Congress and other acts of Congress on the subject of the acquisition and enjoyment of the rights to use water, and also by the laws of the State of Washington, where not inconsistent therewith, modified, if modified at all, by the provisions of the articles of incorporation and by-laws of said association.

11. That nothing contained in this agreement, or to be implied from the fact of its execution, shall be construed, held, or deemed to be an approval of the Secretary of the Interior, nor an adoption by him of the articles of incorporation and by-laws of said association in all their details as the form of organization of water users contemplated and authorized by section 6 of the said act of Congress of June 17, 1902, but such approval and adoption is expressly reserved until the conditions prescribed in said act authorizing such approval and adoption shall have risen; and that when the Secretary of the Interior shall make, approve, and promulgate rules and regulations for the administration of the water to be supplied from
52 said proposed irrigation works, such rules and regulations and such modifications thereof as the Secretary may from time to time approve and promulgate shall be deemed and held to be obligatory upon this association as fully and completely, and to every intent and purpose, as if they were now made, approved, promulgated and written out in full in this agreement, and the same are to be so read and construed.

In witness whereof, the undersigned have hereunto subscribed their names and affixed their seals the day and year first herein written.

THOS. RYAN,
Acting Secretary of the Interior for and on behalf of the United States of America, party of the first part.

SUNNYSIDE WATER USERS' ASSOCIATION,
By S. J. HARRISON, *President.*
(Party of the second part.)

Attest: E. J. Young, secretary.
(Endorsements:) Amended bill of complaint.
Filed September 14, 1911.

FRANK C. NASH, *Clerk.*
By EDWARD E. CLEAVER, *Deputy Clerk.*

In the Circuit Court of the United States for the Eastern District of Washington, Southern Division.

D. P. BAKER, COMPLAINANT,
vs.
CHARLES H. SWIGART, E. MCCULLOH, AND R. K. TIFFANY, respondents.

53 ANSWER OF DEFENDANTS, CHARLES H. SWIGART, E. MCCULLOH, AND R. K. TIFFANY, TO THE AMENDED BILL OF COMPLAINT.

The defendants now and at all times hereafter saving to themselves all, and all manner of benefit or advantage of exception or otherwise that can or may be had or taken to the many errors, uncertainties, and imperfections in the said bill contained, for answer thereto, or to so much thereof as these defendants are advised it is material or necessary for them to make answer to, severally answering say:

I.

Admit that at all times mentioned in the bill of complaint herein plaintiff and the defendants were citizens of the eastern district of Washington, residing in the county of Yakima therein.

II.

The defendants admit that plaintiff made application on or about May 22nd, 1911, to the register and receiver of the United States Land office, at North Yakima, Washington, for a water right under the Sunnyside unit of the Yakima project, but allege that the said application was not the original application made by plaintiff upon said lands; and the defendants do further allege that the said application was made under the following circumstances, to-wit:

The Secretary of the Interior of the United States, pursuant to section 4 of the act of Congress approved June 17, 1902 (32 Stat. L., 388), commonly known as reclamation act, on March 2, 1909, gave public notice that water would be furnished from the said

54 Sunnyside unit under the said reclamation act for certain irrigable lands in Yakima County, including fourteen (14) acres in the southwest quarter of the southeast quarter (S. W. ¼ of S. E. ¼) and seventeen (17) acres in the southeast quarter of the southeast quarter (S. E. ¼ of S. E. ¼) of said section two (2), and that on or about August 14, 1909, the said defendants made application to the said register and receiver for water right under the said Sunnyside unit of the Yakima project, said application being for an area of thirty-one (31) acres, being the sum of the said fourteen acres and the said seventeen acres included in the southeast quarter (S. E. ¼) of section two (2), township ten (10) north, range twenty-one (21) E. W. M., and said application was approved and accepted by the authorized officers of the United States.

The defendants further say that the plaintiff has ever since said August 14, 1909, made all payments demanded by the United States upon said water right application and that there are now no payments due thereon; and plaintiff has been continually supplied with water for said thirty-one (31) acres, and the defendants are now, and at all times have been, willing to supply such water, and now hold themselves in readiness to supply such water.

The defendants further say that subsequent to the date of filing the said water- ight application, the Secretary of the Interior of the United States asecertained by means of surveys made under the direction of the defendants that further and additional land could
55 be irrigated in the said southeast quarter of said section two (2), and that in pursuance of said information ascertained as above set forth, the said Secretary of the Interior did give notice that water would ultimately be furnished from the said Sunnyside unit under the said reclamation act for a total of sixty-two (62) acres of land in the said southeast quarter of section two, but that until further notice the amount of land for which water would be furnished in the said southeast quarter of section two would be limited to thirty-one (31) acres, and that under said notice issued by the Secretary of the Interior the amount of land for which water now is and at all times heretofore has been available for the said southeast quarter of section two is thirty-one (31) acres, and no more (except temporarily, as hereinafter stated).

The defendants further say that the Secretary of the Interior has not, by order or otherwise, enlarged the amount of water which might be furnished for said section, and that no authority has at any time existed or does now exist to furnish water for said southeast quarter of section two, save and except for said thirty-one (31) acres (except temporarily, as hereinafter stated).

The defendants further say that a plat of the said thirty-one acres for which water is available, as aforesaid, is attached hereto, marked "Exhibit A" and made a part hereof, and the same will be herein referred to as "irrigable areas."

The defendants further say that on or about May 22, 1911, the plaintiff made application to the register and receiver of the said land office, in pursuance of the terms of said notice of the
56 Secretary of the Interior dated March 15, 1911, said application being for an ultimate area of sixty-two (62) acres of land. Said application was regularly approved and accepted by the authorized officers of the United States, the said acceptance being for an ultimate area of sixty-two acres, with an irrigable area for 1911 and until further notice, of thirty-one acres; said thirty-one acres being the identical thirty-one acres included in the original application by the plaintiff dated August 14, 1909, to wit:

Fourteen acres in the southwest quarter of the southeast quarter, and seventeen acres in the southeast quarter of the southeast quarter of said section.

2. The defendants further say that under rules and regulations prescribed by the Secretary of the Interior in pursuance of the authority conferred upon him by said reclamation act, it has been customary and usual to sell and dispose of, for temporary use on irrigable lands, water not immediately necessary to irrigable lands subject to permanent water-right entry.

III.

That on or about the 1st day of May, 1911, plaintiff made application to the officers of the Reclamation Service, at North Yakima, Washington, for a water-rental contract upon the remaining thirty-one (31) acres owned by him in said section two (2), for which a permanent supply of water was not yet available; that plaintiff was furnished with the usual application blank for such purpose and was advised by the officers of the Reclamation Service that the charge for such water would be two and fifty-hundredths dollars ($2.50) per acre for the season of 1911, that being the amount fixed by
57 the Secretary of the Interior; that plaintiff refused to furnish the necessary information required by said application blank, and failed, neglected, and refused to pay the said charge of two and fifty-hundredths dollars ($2.50) per acre, or any other sum as water rental, by reason whereof these defendants, as officers of the Reclamation Service, were not authorized to, and declined to furnish water on said additional thirty-one (31) acres until commanded so to do by this court; that the plaintiff was, and is not, entitled to any water whatsoever for said additional thirty-one (31) acres, and had the defendants furnished such water it would have been contrary to the rules, regulations, orders, and directions of the Secretary of the Interior.

IV.

For answer unto paragraph VII of the amended bill defendants say that the Secretary of the Interior on November 18, 1908, fixed a charge for the operation and maintenance under said Sunnyside unit for the year 1909, and until further notice, at ninety-five (95) cents per acre per annum, which said order has not since been abrogated, modified, or changed, and is now in full force and effect, and the defendant has at all times heretofore paid such operation and maintenance fee as required by said order of the Secretary of the Interior.

V.

Defendants admit the organization of the Sunnyside Water Users' Association, as set forth in paragraph VIII of the amended bill, and that the plaintiff became, and is now, a shareholder therein to the extent of sixty-two (62) shares of its capital stock.

58

VI.

Defendants admit that the United States entered into a contract with said Sunnyside Water Users' Association as set forth in paragraph IX of the amended bill.

VII.

Defendants admit that the said Sunnyside Water Users' Association has adopted, and they are now in force, by-laws as set forth in paragraph X of the amended bill, but deny that said contract in any manner prohibits or precludes them from enforcing or collecting the maintenance charges hereinbefore referred to.

VIII.

For answer unto paragraph XI of the amended bill, the defendants deny that there was included in the estimate of the cost of said Sunnyside project a charge of ten dollars ($10.00), or any other sum, for the purpose of covering the cost of the operation of maintenance of said works for the period of ten (10) years, or for any other time, and assert that the estimate of fifty-two dollars ($52.00) per acre was the actual cost of construction as found and determined by the Secretary of the Interior.

IX.

Defendants admit that they are officers of the Reclamation Service of the United States; the defendant Swigart being the supervising engineer of the Reclamation Service in charge of the Washington district, which includes the said Sunnyside unit; the defendant McCulloh being the project engineer of said project, and the defendant Tiffany being the superintendent of irrigation for said project,

59 and that all things done by these defendants, or either of them, were by the authority of such official positions and under the order and direction of the Secretary of the Interior and his subordinate officers.

And these defendants deny all and all manner of unlawful combination and confederacy wherewith they are by said amended bill charged, without this, that there is any other matter, cause, or thing in the said plaintiff's said amended bill of complaint contained, material or necessary for the defendants to make answer unto, and not herein or hereby well and sufficiently answered, confessed, traversed, and avoided or denied, is true to the knowledge or belief of these defendants; all which matters and things these defendants are ready and willing to aver, maintain, and prove, as this honorable court shall direct, and humbly pray to be hence dismissed with their

reasonable costs and charges in this behalf most wrongfully sustained.

(Signed) OSCAR CAIN,
United States Attorney.

(Signed) E. C. MACDONALD,
Assistant United States Attorney.

(Endorsements:) Answer to amended bill of complaint.
Filed October 31, 1911.

FRANK C. NASH, *Clerk.*

60 In the Circuit Court of the United States for the Eastern District of Washington, Southern Division.

In equity.

D. P. BAKER, COMPLAINANT,
vs.
CHAS. H. SWIGART ET AL., RESPONDENTS.

ORDER—NO. 76.

The application of the complainant herein for a temporary injunction coming on to be heard by stipulation of the respective parties, and it appearing to the court that unless the respondents are required by order of this court to forthwith cease and to refrain from refusing to give to the orator waters out of Sunnyside ditch, described in the bill of complaint, upon the lands of the orator described therein, the crops upon the lands of the orator will be destroyed to his irreparable damage; and it appearing that cause exists for the issuance of an injunction as prayed in the bill of complaint, pending the final hearing in said cause, and the court being fully advised in the premises, now, on motion of Hughes, McMicken, Dovell & Ramsey, solicitors for the complainant:

It is ordered that pending the final hearing of said cause, or until the further order of the court, the said respondents, and each of them, and all or any of their agents, servants, or employes, shall desist from diverting the waters of Sunnyside ditch from the lands of the orator, or any portion thereof, now in cultivation, and said respondents, their agents, servants, and employes, shall permit

61 to flow upon said lands, to-wit, the lands of the said orator situate in the southeast quarter (SE. ¼) of section two (2) in township ten (10) north, of range 21, in Yakima County, State of Washington, the usual amount of water therefor.

And it is further ordered that the said complainant shall give to the said respondents a bond in the penal sum of $500 conditioned that the said complainant will pay to the receiver of the land office at North Yakima the sum of $2.50 per acre per annum for the use of

water upon thirty-one acres of said tract hereinbefore described if the same shall be adjudged as rental therefor.

(Signed) FRANK H. RUDKIN,
U. S. District Judge.

(Endorsements:) Injunction order.
Filed July 10, 1911.

FRANK C. NASH, *Clerk*,
By EDWARD E. CLEAVER, *Deputy Clerk.*

In the District Court of the United States for the Eastern District of Washington, Southern Division.

D. P. BAKER, COMPLAINANT,
vs.
CHARLES H. SWIGART, E. MCCULLOH, AND R. K. TIFFANY, respondents.

OPINION.

Hughes, McMicken, Dovell & Ramsey, for complainant.
62 Oscar Cain, U. S. Atty., and E. C. Macdonald, Asst. U. S. Atty.

RUDKIN, District Judge.

Section 1 of the act of Congress of June 17, 1902 (32 Stat. L., 388), commonly known as the "reclamation act," provides that all moneys received from the sale and disposal of public lands in certain States and Territories, beginning with the fiscal year ending June 30, 1901, including the surplus of fees and commissions in excess of allowances to registers and receivers, and excepting the five per centum of the proceeds of the sales of public lands in the above States set aside by law for educational and other purposes, shall be, and the same are hereby, reserved, set aside, and appropriated as a special fund in the Treasury to be known as the "reclamation fund," "to be used in the examination and survey for and the construction and maintenance of irrigation works for the storage, diversion, and development of waters for the reclamation of arid and semiarid lands in the said States and Territories, and for the payment of all other expenditures provided for in this act."

Section 4 provides "that upon the determination by the Secretary of the Interior that any irrigation project is practicable, he may cause to be let contracts for the construction of the same, in such portions or sections as it may be practicable to construct and complete as parts of a whole project, provided the necessary funds for such portions or sections are available in the reclamation fund, and thereupon he shall give public notice of the lands irrigable under

such project, and limit of area per entry, which limit shall
63 represent the acreage which, in the opinion of the Secretary, may be reasonably required for the support of a family upon the lands in question; also of the charges which shall be made per acre upon the said entries and upon lands in private ownership which may be irrigated by the waters of the said irrigation project and the number of annual installments, not exceeding ten, in which such charges shall be paid and the time when such payments shall commence. The said charges shall be determined with a view of returning to the reclamation fund the estimated cost of construction of the project, and shall be apportioned equitably."

Section 6 of the same act provides "that the Secretary of the Interior is hereby authorized and directed to use the reclamation fund for the operation and maintenance of all reservoirs and irrigation works constructed under the provisions of this act: *Provided*, That when the payments required by this act are made for the major portion of the lands irrigated from the waters of any of the works herein provided for, then the management and operation of such irrigation works shall pass to the owners of the lands irrigated thereby, to be maintained at their expense under such form of organization and under such rules and regulations as may be acceptable to the Secretary of the Interior: *Provided*, That the title to and the management and operation of the reservoirs and the works necessary for their protection and operation shall remain in the Government until otherwise provided by Congress."

The sole question presented by the bill and answer in this case is,
Has the Secretary of the Interior authority under the act to
64 levy and collect assessments to defray the cost of maintenance of canals, before payments have been made for the major portion of the lands irrigated therefrom and before the management and operation of the irrigation works have passed to the owners of the lands irrigated thereby?

The argument against the authority of the Secretary is based on section 1 of the act, which authorizes the use of the reclamation fund in the construction and maintenance of irrigation works; on the provision of section 6 which authorizes the Secretary to use the reclamation fund for the operation and maintenance of all reservoirs and irrigation works constructed under the act; and on section 4, which apparently only provides for the return to the reclamation fund of the estimated cost of the construction of the project.

The question thus presented is by no means free from doubt or difficulty. I am convinced that Congress intended that the reclamation fund should remain intact and that it should not be depleted by defraying the expenses of maintenance or otherwise. At the same time, if this authority exists in the Secretary, it rests in implication only, and it is unfortunate, indeed, that so vast a power should have no surer foundation. But the question is not a new one and does not rest on the language of the act of Congress alone. The Secretary has for a number of years both asserted and exercised the

authority he now claims, with the acquiescence of other departments of the Government, and has collected vast sums of money under it. His construction of the act has been approved by the Attorney General (27 Op. Atty. Gen., 360) and by the Circuit Court of
65 Oregon in United States v. Cantrill et al. (176 Fed., 949). The Congress itself has both expressly and impliedly recognized the existence of such authority in many later acts: Act of March 6, 1906 (34 Stat., 53); act of June 21, 1906 (34 Stat., 327); act of March 1, 1907 (34 Stat., 1037); act of April 30, 1908 (35 Stat., 85); act of May 30, 1908 (35 Stat., 562); act of March 3, 1909 (35 Stat., 798); act of Feb. 21, 1911 (36 Stat., 925).

I appreciate the force of the argument that the construction of a legislative act by a subsequent legislature or by another department of the Government is only controlling in doubtful cases, but I am not so far satisfied that the Secretary is acting without warrant or authority of law as to justify a court of first instance at least in denying that authority to him under the circumstances disclosed by this record.

The respondents claim that this is in effect a suit against the Government. If the position taken by the complainant is sound, and the respondents, without authority of law, are attempting to deprive him of rights accorded to him by the law, the claim that this is a suit against the Government is utterly unfounded. United States v. Lee (106 U. S., 196); Pennoyer v. McConnaughy (140 U. S., 1); Regan v. Farmers' Loan & Trust Co. (154 U. S., 362); Belknap v. Schild (161 U. S., 18); Scott v. Donald (165 U. S., 107.)

In view of the conclusion I have reached on the merits
66 of the case a further discussion of this question becomes unnecessary.

Bill dismissed.

(Endorsements:) Opinion.
Filed February 27, 1912.

W. H. HARE, *Clerk*,
By EDWARD E. CLEAVER, *Deputy*.

In the District Court of the United States for the Eastern District of Washington, Southern Division.

D. P. BAKER, COMPLAINANT, *vs.* CHARLES H. SWIGART, E. MCCULLOH, AND R. K. TIFFANY, respondents.	No. 76.

DECREE DISMISSING ACTION.

This cause came on regularly to be heard before the court upon the amended bill of complaint and answer thereto, and after hearing the same, and the court being fully advised herein, it is now

Ordered, adjudged, and decreed that the bill of complaint be, and the same is hereby, dismissed with costs in favor of the defendants taxed by the clerk.

Done in open court this 29th day of March, A. D. 1912.

(Signed) FRANK H. RUDKIN, *Judge.*

(Endorsements:) Decree dismissing action.
Filed March 29, 1912.

W. H. HARE, *Clerk.*

67 In the District Court of the United States for the Eastern District of Washington, Southern Division.

D. P. BAKER, COMPLAINANT,
vs.
CHARLES H. SWIGART, E. MCCULLOH, AND R. K. Tiffany, respondents. } No. 76.

ASSIGNMENT OF ERRORS.

Now on the 13th day of March, 1912, came the complainant, by his solicitors, Messrs. Hughes, McMicken, Dovell & Ramsey, and says that the decree entered in the above cause on the 13th day of March, 1912, is erroneous and unjust to the complainant:

First. Because it decrees that the bill of complaint be dismissed.

Second. Because the decree of the court operates to deny to the complainant the right to hold and enjoy the premises described in the bill of complaint and to use the water granted him by his contract with the United States of America without the payment of any charge for the maintenance of the ditch carrying said water to said premises.

Third. Because the decree gives the Secretary of the Interior, acting by and through the said respondents, the right to arbitrarily assess against said complainant a charge each year for the maintenance and operation of the ditch and irrigation works which supply the water to said premises.

Fourth. Because the said decree gives the said respondents
68 the right to arbitrarily shut off the supply of water from said premises if said charge for maintenance and operation is not paid.

Fifth. Because the act of Congress of June 17, 1902, commonly known as the "reclamation act," requires that all payments for the operation and maintenance of reservoirs and irrigation works constructed under the provisions of said act shall be paid out of the reclamation fund.

Sixth. Because there is no warrant in said act of Congress of June 17, 1902, commonly known as the "reclamation act," or in any other law, for the assessment of charges for operation or maintenance of said irrigation works against the said complainant.

Seventh. Because the said complainant will be irreparably injured by the dissolution of the injunctive order heretofore made in said cause.

Eighth. Because the said complainant will be irreparably injured if a permanent injunction is not issued in said cause perpetually enjoining the said respondents from attempting to assess upon the land of complainant or collect from the said complainant any charge for the maintenance or operation of said irrigation works known as the Sunnyside project.

Wherefore, the complainant prays that said decree be reversed and the district court directed to grant him the relief prayed in the bill of complaint herein.

(Signed) HUGHES, MCMICKEN, DOVELL & RAMSEY,
Solicitors for Complainant.

Service of the foregoing assignment of errors upon said re-
69 spondents this 29th day of March, A. D. 1912, is hereby acknowledged.

(Signed) OSCAR CAIN,
(Signed) E. C. MACDONALD,
Solicitors for Respondents.

(Endorsements): Assignment of error.
Filed March 29, 1912.

W. H. HARE, *Clerk.*

In the District Court of the United States for the Eastern District of Washington, Southern Division.

D. P. BAKER, COMPLAINANT,
vs.
CHARLES H. SWIGART, E. MCCULLOH, AND R. K. TIFFANY, respondents. } No. 76.

PETITION FOR APPEAL TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT AND ORDER ALLOWING THE SAME.

To the honorable District Court of the United States for the Eastern District of Washington:

The above-named complainant, D. P. Baker, conceiving himself aggrieved by the decree made and entered by said court on the 29th day of March, 1912, in the above-entitled cause, does hereby appeal from said decree to the United States Circuit Court of Appeals for the Ninth Circuit, for the reasons specified in the assignment of errors filed herein, and prays that this appeal may be allowed, and that pending the final determination of this cause on appeal
70 the injunction heretofore entered in said action be continued in force by supersedeas, that citation issued to the respondents herein upon said appeal, and that a transcript of the record, proceedings, and papers on which said decree was made, duly authenticated, may be sent to the United States Circuit Court of Appeals for the Ninth Circuit.

Dated this 29th day of March, A. D. 1912.

(Signed) HUGHES, MCMICKEN, DOVELL & RAMSEY,
Solicitors for Complainant.

The foregoing claim of appeal is allowed, and it is hereby ordered that upon the filing by complainant of supersedeas bond in the amount fixed by the order of this court, the injunction order heretofore entered in this cause shall continue in full force pending the final determination of said cause on appeal.

Dated this 29th day of March, A. D. 1912.

(Signed) FRANK H. RUDKIN,
United States District Judge
Presiding in the above-named Court.

Service of the within paper, petition for appeal, and order allowing the same, on the undersigned, this 29th day of March, A. D. 1912, is hereby admitted.

(Signed) OSCAR CAIN,
(Signed) E. C. MACDONALD,
Solicitors for Respondents.

(Endorsements:) Petition for appeal—ordering allowing same. Filed March 29, 1912.

W. H. HARE, *Clerk.*

71 In the District Court of the United States for the Eastern District of Washington, Southern Division.

D. P. BAKER, COMPLAINANT,
vs.
CHARLES H. SWIGART, E. MCCULLOH, AND R. K. TIFFANY, respondents. | No. 76.

ORDER FIXING AMOUNT OF COST AND SUPERSEDEAS BOND.

This cause coming on for hearing upon the application of complainant to have the court fix the amount of the cost and supersedeas bond, and the court being duly advised in the premises:

It is hereby ordered and decreed that the amount of the cost and supersedeas bond of the complainant on appeal herein for superseding the decree herein and continuing in full force, pending the determination of this cause on appeal, of the injunction order heretofore entered herein, be and hereby is fixed at the sum of one thousand dollars.

Done in open court this 29th day of March, A. D. 1912.

(Signed) FRANK H. RUDKIN,
United States District Judge
Presiding in the above-named Court.

Service of the foregoing order is hereby admitted this 29th day of March, A. D. 1912.

(Signed) OSCAR CAIN,
(Signed) E. C. MACDONALD,
Solicitors for Respondents.

72 (Endorsements:) Order fixing amount of cost and supersedeas bond.
Filed March 29, 1912.

W. H. HARE, *Clerk.*

In the District Court of the United States for the Eastern District of Washington, Southern Division.

D. P. BAKER, COMPLAINANT,
vs.
CHARLES H. SWIGART, E. McCULLOH, AND R. K. TIFFANY, respondents. } No. 76.

BOND ON APPEAL.

Know all men by these presents:

That we, D. P. Baker, as principal, and Fidelity and Deposit Company of Maryland, a body corporate, duly incorporated under the laws of the State of Maryland, and authorized to transact the business of surety in the State of Washington, as surety, executing this bond in behalf of said principal, are jointly and severally held and firmly bound unto Charles H. Swigart, E. McCulloh, and R. K. Tiffany, the respondents above named, their heirs, executors, administrators, and assigns, in the just and full sum of one thousand dollars ($1,000), for the payment of which sum, well and truly to be paid, we bind ourselves, our and each of our successors, heirs, executors, administrators, and assigns, jointly and severally, firmly by these presents.

Sealed with our seals and dated this 29th day of March, A. D. 1912.

73 The condition of this obligation is such that—

Whereas, in the above entitled court and action, an order and decree was entered on the 29th day of March, A. D. 1912, dismissing the said action and awarding costs, and the said D. P. Baker having obtained from said court an order allowing an appeal to the United States Circuit Court of Appeals for the Ninth Circuit to reverse the said decree, and supersedeas to continue in full force pending the determination of said cause on appeal the injunction order heretofore entered therein, and a citation directed to the said Charles H. Swigart, E. McCulloch, and R. K. Tiffany is about to be issued, citing and admonishing them to be and appear at the United States Circuit Court of Appeals for the Ninth Circuit, to be holden at San Francisco, California;

Now the condition of the above obligation is such that—

If the said D. P. Baker shall prosecute his said appeal to effect and answer all the damages and costs that may be awarded against him,

if he fail to make his plea good, then the above obligation is to be void; otherwise to remain in full force and virtue.

(Sg.) D. P. BAKER. [SEAL.]
By HUGHES, MCMICKEN, DOVELL & RAMSEY,
His Attorneys Herein.

(Sg.) FIDELITY & DEPOSIT CO. OF MARYLAND,
By JAS. A. WILLIAMS,
Attorney in Fact.

74 Attest: R. E. Pinney, general agent.

Service of the foregoing bond upon the said respondents this 29th day of March, A. D. 1912, is hereby acknowledged.

(Sg.) OSCAR CAIN,
(Sg.) E. C. MACDONALD,
Solicitors for Respondents.

The foregoing bond is hereby approved by me this 29th day of March, A. D. 1912.

(Signed) FRANK H. RUDKIN,
United States District Judge.

(Endorsements:) Bond on appeal.
Filed March 29, 1912. W. H. HARE, *Clerk.*

In the District Court of the United States for the Eastern District of Washington, Southern Division.

D. P. BAKER, COMPLAINANT AND APPELLANT,
vs.
CHARLES H. SWIGART, E. MCCULLOH AND R. K. TIFFANY, respondents and appellees. } No. 76.

CITATION ON APPEAL (ORIGINAL).

UNITED STATES OF AMERICA, 88:

The President of the United States to Charles H. Swigart, E. McCulloh, and R. K. Tiffany, greeting:

You are hereby cited and admonished to be and appear at the United States Circuit Court of Appeals for the Ninth Circuit, to be held at the city of San Francisco, in the State of California,
75 within thirty days from the date of this writ, pursuant to an appeal filed in the clerk's office of the District Court of the United States for the Eastern District of Washington, Southern Division, wherein D. P. Baker is appellant, and you, the said Charles H. Swigart, E. McCulloh, and R. K. Tiffany, are appellees, to show cause, if any there be why the decree in the said appeal mentioned should not be corrected and speedy justice should not be done to the parties in that behalf.

Witness the honorable Edward Douglass White, Chief Justice of the Supreme Court of the United States of America, this 29th day

of March, A. D. 1912, and of the independence of the United States, the one hundred and thirty-sixth year.

[SEAL.] (Signed) FRANK H. RUDKIN,
United States District Judge for the Eastern District of Washington.

(Signed) W. H. HARE,
Clerk of the United States District Court for the Eastern District of Washington.

(Endorsements:) Citation on appeal.
Filed March 29, 1912.
W. H. HARE, *Clerk.*

Service of the foregoing citation upon said appellees this 29th day of March, 1912, is hereby acknowledged.

(Signed) OSCAR CAIN and E. C. MACDONALD,
Solicitors for Respondents, Charles H. Swigart, E. McCulloh, and R. K. Tiffany.

Received copy of the foregoing citation lodged with me for appellees, this 29th day of March, 1912.

W. H. HARE,
Clerk of said Court.

76 In the District court of the United States for the Eastern District of Washington, Southern Division.

D. P. BAKER, COMPLAINANT AND APPELLANT,
vs.
CHARLES H. SWIGART, E. MCCULLOH, AND R. K. TIFFANY, respondents and appellees. } No. 76.

CITATION ON APPEAL.

(Lodged copy.)

UNITED STATES OF AMERICA, ss:

The President of the United States to Charles H. Swigart, E. McCulloh, and R. K. Tiffany, greeting:

You are hereby cited and admonished to be and appear at the United States Circuit Court of Appeals for the Ninth Circuit, to be held at the City of San Francisco, in the State of California, within thirty days from the date of this writ, pursuant to an appeal filed in the clerk's office of the District Court of the United States for the Eastern District of Washington, Southern Division, wherein D. P. Baker is appellant, and you, the said Charles H. Swigart, E. McCulloh, and R. K. Tiffany, are appellees, to show cause, if any there be why the decree in the said appeal mentioned should not be corrected and speedy justice should not be done to the parties in that behalf.

Witness the Honorable Edward Douglass White, Chief Justice of the Supreme Court of the United States of America this 29th
77 day of March, A. D. 1912, and of the independence of the United States, the one hundred and thirty-sixth year.

[SEAL.] (Signed) FRANK H. RUDKIN,
United States District Judge for the Eastern District of Washington.

(Signed) W. H. HARE,
Clerk of the United States District Court for the Eastern District of Washington.
By ——— ———, *Deputy.*

(Endorsed:) Copy of citation on appeal lodged with clerk for appellees. Filed in the United States District Court, Eastern District of Washington, March 29th, 1912.
(Signed) W. H. HARE, *Clerk.*

(Endorsements:) Citation on appeal.
Service of the foregoing citation upon said appellees this 29th day of March, 1912.
(Signed) OSCAR CAIN,
(Signed) E. C. MACDONALD,
Solicitors for said Respondents, Charles H. Swigart, E. McCulloh, and R. K. Tiffany.

78 In the District Court of the United States for the Eastern District of Washington, Southern Division.

D. P. BAKER, COMPLAINANT,
vs.
CHARLES H. SWIGART, E. MCCULLOH, AND R. K. Tiffany, respondents. } No. 76.

STIPULATION WITH RESPECT TO RECORD.

It is hereby stipulated between the parties hereto that the clerk of this court in making up his return to the citation on appeal herein shall include therein the following: Subpoena with marshal's return thereon, affidavit of E. M. Philebaum, affidavit of R. K. Tiffany, affidavit of E. McCulloh, affidavit of H. Y. Saint and A. C. Steinman, affidavit of Charles H. Swigart, amended bill of complaint, answer to amend bill of complaint, injunctive order, opinion of the court, decree dismissing action, assignment of errors, petition for appeal and order allowing the same, order fixing amount of bond, bond on appeal, original citation with acceptance of service thereof, copy of
79 citation lodged with clerk for appellees, stipulation with respect to record, which comprise all the papers, records, and other proceedings which are necessary to the hearing of the appeal in said action in the United States Circuit Court of Appeals,

and that no other papers, records, or other proceedings than those above mentioned need be included by the clerk of said court in making up his return to said citation as a part of such record.

Dated March 29th, 1912.

(Signed) HUGHES, MCMICKEN, DOVELL & RAMSEY,
Solicitors for Complainant.

(Signed) OSCAR CAIN and E. C. MACDONALD,
Solicitors for Respondents.

(Endorsements:) Stipulation with respect to record.
Filed March 29, 1912.

W. H. HARE, *Clerk.*

In the District Court of the United States for the Eastern District of Washington, Southern Division.

D. P. BAKER, COMPLAINANT,
vs.
CHARLES H. SWIGART, E. MCCULLOH, AND R. K. TIFFANY, respondents. } No. 76.

CLERK'S CERTIFICATE TO TRANSCRIPT OF RECORD.

UNITED STATES OF AMERICA,
Eastern District of Washington, ss:

I, W. H. Hare, clerk of the District Court of the United
80 States for the Eastern District of Washington, do hereby certify the foregoing printed pages, numbered from 1 to 79, inclusive, to be a full, true, correct, and complete copy of so much of the record, papers, exhibits, depositions, and other proceedings in the above and foregoing entitled cause as are necessary to the hearing of the appeal therein, in the United States Circuit Court of Appeals, and as is stipulated for by counsel of record herein, as the same remain of record and on file in the office of the clerk of said district court, and that the same constitute the record on appeal from the order, judgment, and decree of the District Court of the United States for the Eastern District of Washington to the Circuit Court of Appeals for the Ninth Judicial Circuit, San Francisco, California.

I further certify that I hereto attach and herewith transmit the original citation issued in this cause.

I further certify that the cost of preparing, certifying, and printing the foregoing transcript is the sum of $187.25, and that the said sum has been paid to me by Messrs. Hughes, McMicken, Dovell & Ramsey, solicitors for complainant and appellant.

In witness whereof I have hereunto set my hand and affixed the seal of said district court at Spokane, in said district, this 1st day of April, 1912.

[SEAL.] (Signed) W. H. HARE, *Clerk.*

81 United States Circuit Court of Appeals for the Ninth Circuit.

D. P. BAKER, APPELLANT,
vs.
CHARLES H. SWIGART, E. MCCULLOH, AND R. K. TIFFANY, appellees. } No. 2125.

Proceedings had in the United States Circuit Court of Appeals for the Ninth Circuit.

ADDENDA.

82 *Index to proceedings had in the United States Circuit Court of Appeals for the Ninth Circuit.*

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83 At a stated term, to wit: The October term, A. D. 1911, of the United States Circuit Court of Appeals for the Ninth Circuit, held in the court room thereof, in the city and county of San Francisco, in the State of California, on Monday, the twentieth day of May, in the year of our Lord one thousand nine hundred and twelve.

Present: Honorable William B. Gilbert, circuit judge; Honorable Erskine M. Ross, circuit judge; Honorable William H. Hunt, circuit judge.

Thereupon, the following proceedings were had:

D. B. BAKER, APPELLANT,
vs.
CHARLES H. SWIGART, E. MCCULLOH, AND R. K. TIFFANY, appellees. } No. 2125.

Order of submission.

Ordered, appeal in the above-entitled cause argued by Mr. W. T. Dovell, counsel for the appellant, and by Mr. United States Attorney Oscar Cain, counsel for the appellees, and submitted to the court for consideration and decision.

84 United States Circuit Court of Appeals for the Ninth Circuit.

D. P. BAKER, APPELLANT,
vs.
CHARLES H. SWIGART ET AL., APPELLEES. } No. 2125.

Opinion U. S. Circuit Court of Appeals upon appeal from the United States District Court, for the Eastern District of Washington, Northern Division.

Before Gilbert, Ross and Hunt, circuit judges.

Ross, circuit judge, delivered the opinion of the court:

This appeal is from a decree entered after a hearing upon bill and answer.

In his amended bill the complainant alleged that, being the owner of certain lands in Yakima County, State of Washington, he made application for a water right under the Sunnyside unit of the Yakima project, the same being a project of the United States Reclamation Service, under the provisions of the act of Congress commonly known as the reclamation act, approved June 17, 1902. The bill alleged a compliance by the complainant with all of the requirements of the act, and an acceptance of his application by the Secretary of the Interior, thus constituting between the United States and (1)[1] himself a contract under its provisions, whereby the Government was to furnish, and he was to receive, out of a ditch called the Sunny-
85 side ditch, three acre-feet of water per acre for his tract of land, paying therefor at the rate of fifty-two dollars per acre in ten annual installments, as provided in the application. The bill further alleged that thereupon, and in reliance upon the contract, the complainant cultivated his land and that there was furnished him out of the ditch and the laterals connected therewith water to irrigate the same, so that at the time of the filing of the bill the complainant had upon his tract a growing crop of alfalfa; that such water was and is necessary for the cultivation of his land and the maturing of his crops, and that there was and is no other source than the Sunnyside ditch from which to secure water; that in the midst of the irrigating season, to-wit, about the month of June, in the year 1911, the defendants to the bill, who are the appellees here, claiming to act as officers of the Reclamation Service of the United States, wrongfully and without warrant of law made an assessment against the complainant to the extent of ninety-five cents per acre for the use of the water, and demanded payment thereof; that the complainant refused to pay the charge so assessed, and thereupon the defendants, claiming to act as officers of the Reclamation Service, wrongfully and without warrant of law, shut off the water from the complainant's land, and threatened to continue to refuse to supply any water therefor unless the complainant should pay upon demand charges from time to time

[1] Page number of original opinion.

assessed, in the manner above indicated, against the land of the complainant, as a pretended charge for the maintenance of the said ditch; that the charge was arbitrarily fixed without authority of law, and without regard to the actual cost of maintaining the ditch, and that the defendants threatened to collect the charge so assessed, and that if the same was not paid upon demand to refuse the complainant water from the ditch for use upon his land.

86 The defendants answered the amended bill and pleaded, among other things, in justification of the allegations of the amended (2) bill in rspect to the arbitrary assessment of ninety-five cents an acre and the coercive attempt to collect the same, as follows:

"For answer unto Paragraph VII of the amended bill defendants say that the Secretary of the Interior on November 18th, 1908, fixed a charge for the operation and maintenance under said Sunnyside unit for the year 1909, and until further notice, at ninety-five (95) cents per acre per annum, which said order has not since been abrogated, modified, or changed, and is now in full force and effect, and the defendant (plaintiff) has at all times heretofore paid such operation and maintenance fee as required by said order of the Secretary of the Interior."

The sole point presented for decision is whether the act of Congress of June 17, 1902 (32 Stat., 389), requires the cost of operation and maintenance of the ditch in question to be paid by the water users prior to the time when the payments required by the act shall have been made for the major portion of the lands irrigated from the waters of the particular works in question. The first thing to do in such a case is to see just what the law-making power has enacted. If the provisions of the statute are plain and unambiguous, the courts must accept the law as there declared; otherwise they would usurp the function of the legislative department of the Government. Of course, if the provisions of the statute in question be uncertain, conflicting, or ambiguous, they become the proper subject for construction, which is a function of the court; in which event and in aid thereof resort may be had tc any construction put upon it by any subsequent act of the same legislative body, if such there be; to the construction placed thereon by that department of

87 the Government charged with the execution of the law, and, in order that the court may be enlightened in its effort rightly to construe the language employed in the statute, reference may also be had to the legislative debates during the pendency of the enactment. These observations are so well supported by the authorities as to make (3) extended reference to them unnecessary. We therefore cite only, among the many to that effect: Houghton v. Payne (194 U. S., 99); Fairbank v. United States (181 U. S., 310); Hamilton v. Rathbone (175 U. S., 421); United States v. Goldenberg (168 U. S., 102); Lake County v. Rollins (130 U. S., 670); United States v. Tanner (147 U. S., 661); United States v. Alger (152 U. S., 384); Webster v. Luther (163 U. S., 331); Bate Refrigerating Company v.

Sulzberger (157 U. S., 1); St. Paul, etc., Railway Company v. Phelps (137 U. S., 528).

Looking at this statute, it is seen that by its first section it is provided that all moneys received from the sale and disposal of public lands in certain named States and Territories—Washington among them—and with certain exceptions not important to be mentioned, shall be and are "reserved, set aside, and appropriated as a special fund in the Treasury to be known as the 'reclamation fund,' to be used in the examination and survey for and the construction and maintenance of irrigation works, for the storage, diversion, and development of waters for the reclamation of arid and semiarid lands in the said States and Territories, and for the payment of all other expenditures provided for in this act; provided," etc.

By the second section of the act the Secretary of the Interior was authorized and directed to make examinations and surveys for and to locate and construct, as therein provided, irrigation works for the storage, diversion, and development of waters, including artesian wells, and to report to Congress at the beginning of each regu-
88 lar session the results of such examination and surveys, and other matters not here necessary to state.

By the third section the Secretary of the Interior was, among other things, authorized to determine whether or not the particular irrigation project is practicable and advisable, and the fourth, fifth, sixth, and tenth sections of the act are as follows: (4)

"SEC. 4. That upon the determination by the Secretary of the Interior that any irrigation project is practicable, he may cause to be let contracts for the construction of the same, in such portions or sections as it may be practicable to construct and complete as parts of the whole project, providing the necessary funds for such portions or sections are available in the reclamation fund, and thereupon he shall give public notice of the lands irrigable under such project, and limit of area per entry, which limit shall represent the acreage which, in the opinion of the Secretary, may be reasonably required for the support of a family upon the lands in question; also of the charges which shall be made per acre upon the said entries, and upon lands in private ownership which may be irrigated by the waters of the said irrigation project, and the number of annual installments, not exceeding ten, in which such charges shall be paid and the time when such payments shall commence. The said charges shall be determined with a view of returning to the reclamation fund the estimated cost of construction of the project, and shall be apportioned equitably: Provided, That in all construction work eight hours shall constitute a day's work, and no Mongolian labor shall be employed thereon.

"SEC. 5. That the entryman upon lands to be irrigated by such works shall, in addition to compliance with the homestead laws, reclaim at least one-half of the total irrigable area of his entry
89 for agricultural purposes, and before receiving patent for the lands covered by his entry shall pay to the Government the

charges apportioned against such tract, as provided in section four. No right to the use of water for land in private ownership shall be sold for a tract exceeding one hundred and sixty acres to any one landowner, and no such sale shall be made to any landowner unless he be an actual bona fide resident on such land, or occupant thereof residing in the neighborhood of said land, and no such right shall permanently attach until all payments therefor are made. The annual installments shall be paid to the receiver of the local land office of the (5) district in which the land is situated, and a failure to make any two payments when due shall render the entry subject to cancellation with the forfeiture of all rights under this act, as well as of any moneys already paid thereon. All moneys received from the above sources shall be paid into the reclamation fund. Registers and receivers shall be allowed the usual commissions on all moneys paid for lands entered under this act.

"SEC. 6. That the Secretary of the Interior is hereby authorized and directed to use the reclamation fund for the operation and maintenance of all reservoirs and irrigation works constructed under the provisions of this act: Provided, That when the payments required by this act are made for the major portion of the lands irrigated from the waters of any of the works herein provided for, then the management and operation of such irrigation works shall pass to the owners of the lands irrigated thereby, to be maintained at their expense under such form of organization and under such rules and regulations as may be acceptable to the Secretary of the Interior:

Provided, That the title to and the management and operation of the reservoirs and the works necessary for their protection and operation shall remain in the Government until otherwise provided by Congress.

"SEC. 10. That the Secretary of the Interior is hereby authorized to perform any and all acts and to make such rules and regulations as may be necessary and proper for the purpose of carrying the provisions of this act into full force and effect."

It is thus seen that by the first section of the act Congress explicitly declares that the reclamation fund thereby created shall be used not only in the examination, survey, and construction of the irrigation works provided for, but also for their maintenance and for the payment of all other expenses provided for in the act.

In the fourth section, in authorizing the Secretary of the Interior to let contracts for the construction of any irrigation project he may have determined to be practicable, "in such portions or sections as it may be practicable to construct and complete as parts (6) of the whole project" Congress expressly made that authority conditional upon the existence in the reclamation fund of available necessary funds for such portions or sections; and, furthermore, expressly declared that "the charges which shall be made per acre upon the said entries and upon lands in private ownership which may be irrigated by the waters of the said irrigation project" (public notice

of which the Secretary was thereby directed to give) "shall be determined with a view of returning to the reclamation fund the estimated cost of construction of the project and shall be apportioned equitably."

In the case of United States v. Cantrall (176 Fed., 940), cited and relied upon by the appellees, the court said that when section 4 of the act "empowered the Secretary of the Interior to fix and
91 determine the charges against the land it must have intended that he should thereby cover the cost of maintenance and operation while in control of the United States, as well as construction. "I can not find," said the learned judge, "anything in the language which makes it unlawful for the Secretary to divide the charges made by him against the land into two parts, one for construction and the other for maintenance and operation. It is true he is authorized by section 6 to use the reclamation fund for the operation and maintenance of the system until the management thereof passes to the landowners, but he is at the same time required by section 4 to levy such a charge against the land as will return to the fund the estimated cost thereof (of the system). Unless, therefore, he has authority to cover the cost of operation and maintenance by charge upon the lands, the system must lie dormant and unused until the major portion of the entrymen shall pay the charges for cost of construction in full, or in time the fund will be exhausted and depleted, a result evidently not intended by Congress. Such a construction of the act is not required by its language and would be inconsistent with its general intent and purposes." (7)

Not only do we find nothing in section 4 of the act requiring the Secretary of the Interior to levy such a charge against the land as will return to the reclamation fund the entire estimated cost of the system, but we are of the opinion that the express declaration of Congress in the very same section, declaring that "the said charges shall be determined with a view of returning to the reclamation fund the estimated cost of construction of the project, and shall be apportioned equitably," precludes the reading into that section the further cost "of operation and maintenance" of the system—first, because to do so would be to legislate, which the court has no power
92 to do; and second, because it would be to legislate in direct contravention of other provisions of the same act, namely, of that provision of section 5 where it is provided that the entryman upon lands to be irrigated by such works "before receiving patent for the lands covered by his entry shall pay to the Government the charges apportioned against such tract, as provided in section four," and of that portion of section 1 of the act which expressly declares that the reclamation fund shall be "used in the examination and survey for and the construction and maintenance of irrigation works, for the storage, diversion, and development of waters for the reclamation of arid and semiarid lands in the said States and Territories, and for the payment of all other expenditures provided for in this

act;" and particularly in contravention of this express and explicit provision of section 6 of the act:

"That the Secretary of the Interior is hereby authorized and directed to use the reclamation fund for the operation and maintenance of all reservoirs and irrigation works constructed under the provisions of this act: *Provided*, That when the payments required by this act are made for the major portion of the lands irrigated from the waters of any of the works herein provided for, then the management and operation of such irrigation works shall pass to the owners of the lands irrigated thereby, to be maintained at their expense under such form of organization and under such rules and regulations (8) as may be acceptable to the Secretary of the Interior: *Provided*, That the title to and the management and operation of the reservoirs and the works necesssary for their protection and operation shall remain in the Government until otherwise provided by Congress."

We confess ourselves unable to see any ambiguity in the act,
93 and we are of the opinion that the intent of Congress is plainly stated in its provisions. We must, therefore, take the law as we find it enacted and give it effect without regard to the construction adopted by the Department of the Interior and notwithstanding the opinion of the learned Attorney General (27 Opins. Att'y Gen., 360–374), for both of which we entertain, as we should, the highest respect.

That the view we take of the act is in accord with what must have been the understanding of Congress in making the enactment is shown by these proceedings in the Senate and House of Representatives in reference to the measure, as disclosed by the Congressional Record. In the report of the Senate Committee (Cong. Rec., vol. 35, part 3, page 2276) is the following:

"It also provides that the cost of operation and maintenance of reservoirs and irrigation works shall be paid from the irrigation fund, but when payments are made on the major portion of the lands irrigated under any project, the management and operation of all works, except reservoirs and the works necessary for their operation and production, shall pass to the owners of the land, to be maintained at their expense under rules prescribed by the Secretary." And in the course of the speech of Representative Jones, of the State of Washington, now a Senator of that State, made in advocacy of the measure (Cong. Rec., vol. 35, part 7, p. 6753), is the following:

"* * * In other words, the Government gets its money back. This payment, it may be said, however, goes into the reclamation fund to be reexpended. This is true, but whenever the Government ceases to construct irrigation works and all the land is taken and paid for, the fund is entire and can be turned back into the General
(9) Treasury so that in the end the Government will receive all
94 of its expenditures, except, probably, such amount as may be expended for maintenance." And Representative Ray, speak-

ing in opposition to the measure, said at page 6683 of volume 35, part 7, of the Congressional Record:

"It is conceded that the money never can come back, because the cost of maintenance or the cost of the extension and repairs will use all."

For the reasons stated the judgment of the court below must be and is reversed, and the cause remanded for further proceedings in accordance with the views above expressed.

(Endorsed:) Opinion. Filed Oct. 7, 1912. F. D. Monckton, clerk. U. S. Circuit Court of Appeals for the Ninth Circuit.

95 United States Circuit Court of Appeals for the Ninth Circuit.

D. P. BAKER, APPELLANT, *vs.* CHARLES H. SWIGART, E. MCCULLOH, AND R. K. TIFFANY, appellees.	No. 2125.

Dissenting opinion of Gilbert, Circuit Judge.

Although the question of the construction of one of the provisions of the act here involved is not wholly free from doubt, I am of the opinion that the judgment of the court below should be affirmed for the following reasons:

1. It was clearly the intention of Congress that none of the reclamation fund should be dissipated in the construction or maintenance of reservoirs or of irrigation works, but that all moneys so expended should be returned to the fund, thereafter to be used in other similar projects. In American Tobacco Co. v. Werckmeister (207 U. S., 284, 293) the court said: "But in construing a statute we are not always confined to a literal reading, and may consider its object and purpose, the things with which it is dealing, and the
96 condition of affairs which led to its enactment so as to effectuate rather than destroy the spirit and force of the law which the legislature intended to enact." In the opinion of the majority of this court certain language is quoted from the report of the Senate committee upon the bill when it was under consideration in that body, in which it was stated that the bill "provides that the cost of operation and maintenance of reservoirs and cost of works shall be paid from the irrigation fund." When the remainder of the report is read, however, it will be seen that the meaning of the passage so quoted is that such cost of operation [1] and maintenance shall be paid in the first instance, only, from the irrigation fund, and that it was the understanding of the committee that the bill required that such expense be repaid to the fund by the entrymen on the irrigated

[1] Page number of original opinion.

lands, for the report says: "By this method the fund will constantly be replenished, making irrigation practically a self-supporting enterprise, and according to estimates by the Geological Survey, ultimately putting money into the Treasury." All that was said upon the subject in the debate in the Senate is in harmony with this idea. Thus, Senator Patterson expressed his belief that the proposed law was "so framed that the fund it produces will be a constantly accumulating fund." Another Senator said that the fund would "be perpetual," and another said that the bill provides for the "return of the fund." The same view is still more clearly expressed in the report of the committee of the House, which declares that the expenditure of the proceeds of the sales of public lands to be used under the bill was "by no means a direct expenditure, but is rather in the nature of a loan, inasmuch as the settler is to pay to the Government the cost of the reclamation of his land. * * * It
97 is true that if the bill becomes a law and works satisfactorily in the course of time a large sum of money will be spent by the Government in the construction of irrigation works, but under the provisions of the bill all of these sums are to be repaid so that the reclamation fund instead of decreasing will constantly increase. The only actual expenditure under the bill not reimbursable would be certain items of administration, surveys, and examinations of projects, the construction of which for one reason or another might not be undertaken." The quotation in the opinion of the majority of this court from the remarks of Mr. Ray is, I submit, misunderstood. When all that he said is considered it will be seen that his objection to the bill was not that the money expended in construction and maintenance would (2) not come back to the reclamation fund, but that it would never come back to the "Public Treasury," for he said: "Now, whatever comes back from the men who take up these lands is not under this bill to come back into the Public Treasury and to be used for the benefit of all the people, but that money is to be used in the repair of existing and in the construction and extension of other irrigation works; and it is conceded, I may say, by the Committee on Irrigation, and conceded everywhere, that the Public Treasury will never get back the cost of construction." And Mr. Ray predicted that if the money was ever returned to the Public Treasury it would be "away in the far distant future, when the present generation and its descendants, their great-grandchildren, and their great-great-grandchildren are all gone." Mr. Mondell, in discussing the bill, said that it was the purpose thereof to require the settlers to "pay to the Government every dollar of its expenditure in bringing water to their land, and in addition
98 to that the great cost of building laterals, of leveling the land, and preparing it for irrigation." The only discordant note is found in the remarks of Mr. Jones, of Washington, who discovered in the language of the act ground for apprehending that the Government would "probably" not get back the money expended for maintenance. Debates in Congress, however, are not appropriate sources

from which to discover the meaning of statutes. Appropriate sources are the reports of the committees of either branch of Congress. (Binns v. United States (194 U. S., 480); Holy Trinity Church v. United States (143 U. S., 457).)

2. The language of the statute is not repugnant to the evident intention of Congress. Section 1 of the act authorizes the expenditure of the money of the reclamation fund for the "construction and maintenance" of irrigation works. Section 6 directs the Secretary of the Interior to use that fund for the "operation and maintenance" of each of such works until the time when payments (3) shall have been made for the major portion of the lands irrigated from the waters of such works, after which the management and operation shall pass to the owners of the lands irrigated. Section 4 provides for the repayment to the reclamation fund of the moneys so expended by charges equitably assessed against the settler, and it declares that "the said charges shall be determined with a view of returning to the reclamation fund the estimated cost of construction of the project." I submit that the words "construction of the project" are used in a broad and comprehensive sense, and that they mean the construction, repair, and maintenance of the project until it shall be turned over to the beneficiaries thereof under the provisions of section 6. The construction of an irrigation system thereafter
99 to be delivered to others may fairly be said to involve the maintenance thereof until the time of delivery. Such maintenance and keeping in repair is included in the construction. The maintenance is the holding together that which is put together in construction. The word "construction" as used in statutes has often been given such a meaning. Under a statute authorizing the issuance of bonds for "constructing public roads" it was held that the term "constructing" was used in a comprehensive sense, and meant not merely the construction of new roads but meant the maintenance and betterment of roads already in existence. (Western v. Hancock County, 54 So., 307.) So it was held under a statute authorizing cities and towns "to construct waterworks and light plants" that the words conferred authority to purchase waterworks and light plants already constructed by private enterprise. (Seymour v. City of Tacoma, 32 Pac., 1077.) And in construing an act which authorized the city of Brooklyn to "construct" a sewer, the court said: "Nor do we think that the phrases 'to construct' and 'to be constructed' are in the purview of this act to be confined to the bare cost of building a sewer. Doubtless to construct is primarily to form (4), to build together; and the power to construct may in many cases end when the work of building is done. But here the power to construct is the power to keep together as well as the power to put together, the power to maintain, protect, and preserve, as well as the power to erect." (Matter of application of Fowler, 53 N. Y., 60.)

3. The contemporaneous construction of the statute by the executive officers of the Government whose duty it was to execute it is in

harmony with the legislative intent, as shown by the reports
100 of the committees of the Senate and the House, and such construction should not be overruled "without cogent reasons." United States v. Moore, 95 U. S., 760; Pennoyer v. McConnaughy, 140 U. S., 1, 23.

(Endorsed:) Dissenting opinion. Filed Oct. 7, 1912, F. D. Monckton, clerk U. S. Circuit Court of Appeals for the Ninth Circuit.

101 United States Circuit Court of Appeals for the Ninth Circuit.

D. P. BAKER, APPELLANT,
vs.
CHARLES H. SWIGART, E. MCCULLOH, AND R. K. TIFFANY, appellees.
No. 2125.

Decree U. S. Circuit Court of Appeals.

Appeal from the District Court of the United States for the Eastern District of Washington, Southern Division.

This cause came on to be heard on the transcript of the record from the District Court of the United States for the Eastern District of Washington, Southern Division, and was duly submitted:

On consideration whereof, it is now here ordered, adjudged, and decreed by this court, that the decree of the said district court in this cause be, and hereby is, reversed, and the cause remanded to the said district court for further proceedings in accordance with the views expressed in the opinion of this court.

(Endorsed:) Decree. Filed and entered October 7, 1912. F. D. Monckton, clerk.

102 In the United States Circuit Court of Appeals for the Ninth Circuit.

CHARLES H. SWIGART, E. MCCOLLOH, AND R. K. TIFFANY, appellants,
vs.
D. P. BAKER, APPELLEE.
No. 2125.

Petition for allowance of appeal to Supreme Court U. S.

The above-named appellants, Charles H. Swigart, E. McColloh, and R. K. Tiffany, respectfully show that the above-entitled cause is now pending in the United States Circuit Court of Appeals for the Ninth Circuit, and that a decree has therein been rendered on the 7th day of October, A. D. 1912, reversing the decree of the District Court of the United States for the Eastern District of Washington, and that the matter in controversy in said suit exceeds the sum of ten thousand dollars, besides costs; that this cause is one in which the

United States Circuit Court of Appeals for the Ninth Circuit has not final jurisdiction, and that it is a proper cause to be reviewed by the Supreme Court of the United States on appeal.

Wherefore the said appellants pray that an appeal be allowed them in the above-entitled cause directing the clerk of the United States Circuit Court of Appeals for the Ninth Circuit to send the
103 record and proceedings in said cause, with all things concerning the same, to the Supreme Court of the United States, in order that the errors complained of in the assignment of errors herewith filed by the said appellants, may be reviewed, and if error be found, corrected according to the laws and customs of the United States.

Dated this 23 day of December, 1912.

(Signed) OSCAR CAIN,
Solicitors for Appellants.

We hereby, this 24 day of December, A. D. 1912, accept due personal service of the within petition for appeal, on behalf of appellee, D. P. Baker.

(Signed) W. T. DOVELL,
HUGHES, MCMICKEN, DOVELL & RAMSEY,
Counsel for Appellee.

(Endorsed:) Petition for allowance of appeal to Supreme Court U. S. Filed Jan. 13, 1913. F. D. Monckton, clerk U. S. Circuit Court of Appeals for the Ninth Circuit.

104 In the United States Circuit Court of Appeals for the Ninth Circuit.

CHARLES H. SWIGART, E. MCCOLLOH, AND R. K. TIFFANY, appellants,
vs.
D. P. BAKER, APPELLEE.
} No. 2125.

Stipulation that amount in controversy exceeds $5,000.

It is hereby stipulated and agreed by and between the parties hereto that the amount in controversy in this action exceeds the sum of five thousand dollars.

Dated this 24th day of December, A. D. 1912.

OSCAR CAIN,
Counsel for Appellants.
W. T. DOVELL,
Of Counsel for Appellee.

(Endorsed:) Stipulation that amount in controversy exceeds $5,000. Filed Jan. 13, 1913. F. D. Monckton, clerk.

105 In the Circuit Court of Appeals for the Ninth Circuit.

D. P. BAKER, APPELLANT,
vs.
CHARLES H. SWIGART, E. MCCOLLOH, AND R. K. TIFFANY, appellees. } No. 2125.

Assignment of errors.

The above-named appellees, feeling and alleging that there is manifest error in the decree of this court made and entered herein on October 7, 1912, make and file the following assignment of the errors so committed, upon which they will rely in their appeal from the said decree to the Supreme Court:

1. The said Circuit Court of Appeals erred in reversing the decree of the District Court for the Eastern District of Washington.

2. The said Circuit Court of Appeals erred in decreeing and adjudging in effect that a decree must be entered by the said District court granting to the appellant and plaintiff the relief prayed for in his bill.

3. The said Circuit Court of Appeals erred in not affirming the decree of the said District Court.

4. The said Circuit Court of Appeals erred in holding and adjudging that the cost of operating and maintaining the irrigation works mentioned in the pleadings is not chargeable to the water users thereunder, but must be discharged by the Government
106 out of the reclamation fund without expense to them.

5. The Circuit Court of Appeals erred in holding and adjudging that the plaintiff was not liable to pay to the United States any part of the cost of maintaining and operating the said irrigation works, but was entitled to the use of water and other benefits accruing to him as such water user without payment beyond his pro rata portion of the original estimated cost of building the irrigation works.

6. The Circuit Court of Appeals erred in not holding that the cost of operating and maintaining such works pending the delivery thereof and of their management to the beneficiaries of the reclamation project is a part of the cost of construction within the meaning of the reclamation act.

7. The Circuit Court of Appeals erred in denying to the Secretary of the Interior the authority to determine and collect reasonable charges for the maintenance and operation of reclamation projects pending the completion and transfer thereof to the water users thereunder.

8. The Circuit Court of Appeals erred in not adjudging that the decree of the District Court should be reversed and the cause dismissed for lack of jurisdiction.

Wherefore, they pray that the said decree of the Circuit Court of Appeals be reversed and a decree be entered herein dismissing the plaintiff's bill.

OSCAR CAIN,
Solicitor for the above-named Appellees.

(Endorsed:) Assignment of errors. Filed Dec. 26, 1912. F. D. Monckton, clerk U. S. Circuit Court of Appeals for the Ninth Circuit.

107 In the United States Circuit Court of Appeals for the Ninth Circuit.

D. P. BAKER, APPELLANT,
vs.
CHARLES H. SWIGART, E. MCCOLLOH, AND R. K. TIFFANY, appellees. } No. 2125.

Acceptance of service of assignments of error.

We hereby, this 24th day of December, A. D. 1912, accept due personal service of the within assignment of errors on behalf of the appellee, D. P. Baker.

W. T. DOVELL,
HUGHES, MCMICKEN, DOVELL & RAMSEY,
Counsel for Appellant.

(Endorsed:) Acceptance of service of assignments of error. Filed Jan. 13, 1913. F. D. Monckton, clerk.

108 In the United States Circuit Court of Appeals for the Ninth Circuit.

CHARLES H. SWIGART, E. MCCOLLOH, AND R. K. TIFFANY, appellants,
vs.
D. P. BAKER, APPELLEE. } No. 2125.

Order allowing appeal to Supreme Court U. S.

It is hereby ordered that the appeal in the above-entitled case to the Supreme Court of the United States be, and is hereby, allowed as prayed.

Dated this 8th day of January, A. D. 1913.

WM. B. GILBERT,
United States Circuit Judge, Ninth Circuit.

(Endorsed:) Order allowing appeal to Supreme Court U. S. Filed Jan. 13, 1913. F. D. Monckton, clerk.

109 In the United States Circuit Court of Appeals for the Ninth Circuit.

CHARLES H. SWIGART, E. MCCULLOH, AND R. K. TIFFANY, appellants,
vs.
D. P. BAKER, APPELLEE. } No. 2125.

Notice to D. P. Baker and counsel that appellant has taken appeal, etc.

You will please take notice that Charles H. Swigart, E. McCulloh, and R. K. Tiffany, appellants in the above-entitled cause, have taken an appeal to the Supreme Court of the United States from the decree of the United States Circuit Court of Appeals for the Ninth Circuit, which decree was entered on or about the 7th day of October, A. D. 1912, and is a decree reversing the decree made in the United States District Court for the Eastern District of Washington on or about the 29th day of March, 1912, being the decree on the merits in said cause in favor of the appellants and against the appellee herein, dismissing the bill of complaint.

You will also take notice that a copy of the citation in such appeal, allowed and signed by Honorable William B. Gilbert, United States Circuit Judge for the Ninth Circuit, on the 8th day of
110 January, A. D. 1913, has been lodged in the office of the clerk of said Court of Appeals, Ninth Circuit, as provided by law.

(Signed) OSCAR CAIN,
Counsel for Appellants.

We hereby, on the 24th day of December, A. D. 1912, accept due personal service of the within notice of appeal on behalf of appellee, D. P. Baker.

(Signed) W. T. DOVELL,
HUGHES, MCMICKEN, DOVELL & RAMSEY,
Counsel for Appellee.

(Endorsed): Notice to D. P. Baker and counsel that appellant has taken appeal, etc. Filed January 13, 1913. F. D. Monckton, clerk U. S. Circuit Court of Appeals for the Ninth Circuit.

111 United States Circuit Court of Appeals for the Ninth Circuit.

D. P. BAKER, APPELLANT,
vs.
CHARLES H. SWIGART, E. MCCULLOH, AND R. K. TIFFANY, appellees. } No. 2125.

Praecipe for certified transcript of record on appeal to Supreme Court of the United States.

To the clerk of the said court:

SIR: Please issue a certified transcript of the record on appeal to the Supreme Court of the United States in the above-entitled cause, consisting of the following:

1. Certified copy of printed transcript of record, to which will be added a certified copy of proceedings had in the Circuit Court of Appeals, viz,
2. Order of submission;
3. Opinion and dissenting opinion;
4. Decree;
5. Petition for appeal to Supreme Court U. S.;
6. Order allowing appeal to Supreme Court U. S.;
7. Assignment of errors;
8. Acceptance of service of assignment of errors;
9. Stipulation re amount in controversy;

112 10. Notice of appeal;

11. Praecipe for certified transcript of record on appeal to Supreme Court U. S.;
12. Certificate of clerk U. S. C. C. A. to transcript of record on appeal to Supreme Court U. S.; and
13. Original citation on appeal to Supreme Court U. S.

(Signed) OSCAR CAIN,
United States Attorney.

We hereby, this 11th day of January, A. D. 1913, accept due personal service of the within praecipe on behalf of D. P. Baker.

(Signed) W. T. DOVELL,
Counsel for D. P. Baker.

(Endorsed:) Praecipe for certified transcript of record on appeal to Supreme Court of the United States. Filed Jan. 15, 1913. F. D. Monckton, clerk U. S. Circuit Court of Appeals for the Ninth Circuit.

113 United States Circuit Court of Appeals for the Ninth Circuit.

D. P. BAKER, APPELLANT,
vs.
CHARLES H. SWIGART, E. MCCOLLOH, AND R. K. TIFFANY, appellees. | No. 2125.

Certificate of clerk U. S. Circuit Court of Appeals to transcript of record upon appeal to the Supreme Court of the United States.

I, Frank D. Monckton, as clerk of the United States Circuit Court of Appeals for the Ninth Circuit, do hereby certify the foregoing one hundred and twelve (112) pages, numbered from and including one (1) to and including one hundred and twelve (112), to be a true copy of the complete record in the above-entitled cause, prepared pursuant to praecipe therefor filed by counsel for the appellees, including all proceedings had therein, and including the opinion and dissenting opinion and the assignment of errors filed therein, as the same remain on file and appear of record in my office, and that the same, together, constitute the transcript of record in said cause on appeal to the Supreme Court of the United States.

Attest my hand and the seal of the said the United States Circuit Court of Appeals for the Ninth Circuit, at the city of San Francisco, in the State of California, this fifteenth day of January, A. D. 1913.

[SEAL.] F. D. MONCKTON, *Clerk*.

114 In the United States Circuit Court of Appeals for the Ninth Circuit.

CHARLES H. SWIGART, E. MCCOLLOH, AND R. K. TIFFANY, appellants,
vs.
D. P. BAKER, APPELLEE. | No. 2125. Citation.

United States Circuit Court of Appeals, Ninth Circuit.

United States of America, Ninth Circuit, to D. P. Baker, appellee:

You are hereby cited and admonished to be and appear in the Supreme Court of the United States, at the city of Washington, in the District of Columbia, sixty days after the date of this citation, pursuant to an appeal allowed and filed in the clerk's office of the United States Circuit Court of Appeals for the Ninth Circuit, wherein Charles H. Swigart, E. McColloh, and R. K. Tiffany are appellants and you are appellee, to show cause, if any there be, why the decree rendered against the said appellants, as in said appeal mentioned, should not be corrected, and why speedy justice should not be done the parties in that behalf.

Witness the Honorable Wm. B. Gilbert, judge of the United States Circuit Court of Appeals for the Ninth Circuit, this 8th day of January, A. D. 1913.

WM. B. GILBERT,
Judge United States Circuit Court of Appeals, Ninth Circuit.

115 (Indorsement:) No. 2125. In the Circuit Court of Appeals of the United States for the Ninth Circuit. Charles H. Swigart, E. McColloh, and R. K. Tiffany, appellants, vs. D. P. Baker, appellee. Citation. Filed Jan. 15, 1913. F. D. Monckton, clerk U. S. Circuit Court of Appeals for the Ninth Circuit.

We hereby, this 11th day of January, A. D. 1913, accept due personal service of the within citation on behalf of the appellee, D. P. Baker.

W. T. DOVELL,
Counsel for Appellee.

(Indorsement on cover:) File No. 23519. United States Circuit Court Appeals, 9th Circuit. Term No. 944. Charles H. Swigart, E. McColloh, and R. K. Tiffany, appellants, vs. D. P. Baker. Filed January 24th, 1913. File No. 23519.

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Office Supreme Court, U. S.
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JAMES H. McKENNEY,
CLERK.

In the Supreme Court of the United States.

OCTOBER TERM, 1912. No. 944.

CHARLES H. SWIGART, E. McCULLOH, AND R. K. TIFFANY,

Appellants,

v.

D. P. BAKER,

Appellee.

ON APPEAL FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

MOTION BY THE UNITED STATES TO ADVANCE.

The Solicitor General moves that this cause be advanced for early hearing because of its great public importance.

The appellee here filed a bill against the appellants, officers of the United States Reclamation Service, seeking to enjoin them from attempting, by cutting off the supply of water, etc., to enforce the collection of certain charges imposed against him in connection with the maintenance and operation of the Sunnyside Unit of the Yakima Project in the State of Washington. These charges were imposed under instructions from the Secretary of the Interior who, in formulating and executing his plans for carrying out

the purpose of the reclamation act of June 17, 1902 (32 Stat., 388), proceeded upon the theory that all the public moneys expended in constructing irrigation works and placing the various projects upon their feet as going concerns, are, by the intention of Congress, to be ultimately returned to the Government by the water users, and that the necessary cost of maintaining and operating such works, pending their completion, must be charged and collected as well as the originally estimated cost of construction.

The district court for the eastern district of Washington dismissed the bill, but on appeal the Circuit Court of Appeals for the Ninth Circuit reversed the trial court and held that the cost of maintaining and operating the national reclamation projects, pending the completion thereof, can not be lawfully charged to, or collected from, the water users by the Secretary of the Interior and, accordingly, the court directed the entry of a decree enjoining the appellants from attempting to enforce the charge against the appellee. For full particulars of the question involved and the grounds of decision reference is here made to the opinions in the printed record.

Upwards of seventy-five million dollars have been invested by the Government in the various reclamation projects, and, under the regulations of the Secretary of the Interior, operation and maintenance charges are payable for nearly five hundred thousand acres, embracing about 10,600 farms within seventeen projects located at various places in the West. These

charges average somewhat more than one dollar per acre per year, requiring annual payments by water users ranging from forty to two hundred dollars, according to the sizes of the individual farms. The total amount which has already been collected under this rule approximates nine hundred thousand dollars, while the amount which will thus be due prior to the next irrigation season is estimated at five hundred thousand dollars. The decision of the Circuit Court of Appeals declares the collection of this money to be unlawful, and while this decision stands the numerous water users will naturally object, and many of them will undoubtedly refuse, to make the payments. Should the water be turned off because of such refusals great injury would result in many cases. On the other hand, should the Secretary of the Interior, in deference to the decision of the Court of Appeals, refrain from making such collections and should this court thereafter adjudge that it was his duty to make them, much difficulty will be encountered by the Government in securing reimbursement of the accumulated demands. Indeed, in many instances it will be practically impossible to make collections.

For these and other reasons it is urged that a delay of the hearing and decision of the case beyond the present term would lead to unfortunate misunderstandings and a disturbance of the cordial relations between the officers of the Government and the water users, upon which the successful and

economical execution of the reclamation law necessarily depends.

It is therefore respectfully submitted that because of the large public interests involved this case should be advanced. Opposing counsel concur.

WM. MARSHALL BULLITT,
Solicitor General.

JANUARY 30, 1913.

WASHINGTON : GOVERNMENT PRINTING OFFICE : 1913

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In the Supreme Court of the United States.

OCTOBER TERM, 1912.

CHARLES H. SWIGART, E. McCULLOH, AND R. K. Tiffany, appellants,
v.
D. P. BAKER, APPELLEE.
No. 944.

APPEAL FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

BRIEF FOR APPELLANTS.

The appellants are officials of the Reclamation Service, having public duties to perform in respect of the Sunnyside Unit of the Yakima reclamation project in the State of Washington. The appellee is the owner of certain land included within the areas of lands deemed irrigable within the Sunnyside Unit, and brought this suit, in the Circuit Court for the Eastern District of Washington, in the assertion of an alleged right to the use of water for the irrigation of those lands, claiming that the right had been interfered with and would be further interfered with by the conduct of the appellants. With the extinction of the Circuit Court the case passed to the District Court for the district aforesaid, and there progressed

to a hearing upon amended bill and answer, which resulted in a final decree dismissing the bill. Confusion and irrelevancy are not absent from the pleadings, but we do not deem it necessary to review them in detail, since the construction of them adopted by all parties and accepted by both courts below involves but a simple state of facts and a single issue of law. Plaintiff alleged that, as an owner of 31 acres of private land, he had applied to the Secretary of the Interior for a water right in the Sunnyside Unit and that the application had been duly approved; that under this approved application the only charges which he could lawfully be obliged to pay were the charges for building the works, which had been fixed at $52 per acre, payable in 10 annual installments, but that the defendants, pretending to act as officials, were unlawfully demanding in addition an annual charge of 95 cents per acre on account of the cost of maintenance and operation of the works, and threatening to deprive him of all enjoyment of water until he should comply with their demand. The defendants in their answer conceded the facts, but justified their conduct by alleging (R., 32):

> That the Secretary of the Interior, on November 18, 1908, fixed a charge for the operation and maintenance under said Sunnyside unit for the year 1909 and until further notice at 95 cents per acre per annum, which said order has not since been abrogated, modified, or changed, and is now in full force and effect, and the defendant has at all times

> heretofore paid such operation and maintenance fee as required by said order of the Secretary of the Interior.

The District Judge in his opinion (R., 36) declared:

> The sole question presented by the bill and answer in this case is, Has the Secretary of the Interior authority under the act to levy and collect assessments to defray the cost of maintenance of canals, before payments have been made for the major portion of the lands irrigated therefrom and before the management and operation of the irrigation works have passed to the owners of the lands irrigated thereby?

In the Circuit Court of Appeals the same view of the issues presented by the record was urged in the assignment of errors, agreed to in the opposing briefs, and adopted without question by the court; and the decree of dismissal was reversed purely upon the ground that the Secretary of the Interior is not authorized by the original reclamation act to exact any payment from the water users to recoup the Government for the cost of maintaining and operating the irrigation works (R., 48), two judges (Ross and Hunt) concurring in this view and one (Gilbert) dissenting. The decree of that court is that the cause be reversed and remanded to the district court "for further proceedings in accordance with the views expressed in the opinion of this court."[1] (R., 56.)

[1] There was also a question of jurisdiction raised by the defendants which was decided against them by the lower court expressly and in the higher court by necessary implication. That objection is not renewed in this court.

The original reclamation act (approved June 17, 1902, 32 Stat., 388) is given in full in an appendix to this brief. The first section sets aside all of the receipts (except 5 per cent) from the sale and disposal of public lands in 16 States and Territories as a special fund in the Treasury, to be known as the reclamation fund—

> To be used in the examination and survey for and the construction and maintenance of irrigation works for the storage, diversion, and development of waters for the reclamation of arid and semiarid lands in the said States and Territories, and for the payment of all other expenditures provided for in this act.

By section 2 the Secretary of the Interior is authorized and directed to make examinations and surveys for, and to locate and construct, irrigation works, etc., and is required to report to Congress at the beginning of each regular session the results of such examinations and surveys, giving estimates of cost of all completed works, the quantity and location of the land which can be irrigated therefrom, and all facts relative to the practicability of each irrigation project, together with the cost of works in process of construction, as well as those which have been completed.

Regular reports, known as the Reports of the Reclamation Service, have been made to Congress yearly pursuant to this section.

Section 3 *inter alia* authorizes the Secretary when beginning the surveys of any contemplated irrigation

works, to withdraw from entry, except under homestead laws, any public lands believed to be susceptible of irrigation "from said works," and provides—

> That said surveys shall be prosecuted diligently to completion, and upon the completion thereof, and of the necessary maps, plans, and estimates of cost, the Secretary of the Interior shall determine whether or not said project is practicable and advisable, etc.

Section 4 provides—

> That upon the determination by the Secretary of the Interior that any irrigation project is practicable, he may cause to be let contracts for the construction of the same, in such portions or sections as it may be practicable to construct and complete as parts of the whole project, providing the necessary funds for such portions or sections are available in the reclamation fund, and thereupon he shall give public notice of the lands irrigable under such project, and limit of area per entry, which limit shall represent the acreage which, in the opinion of the Secretary, may be reasonably required for the support of a family upon the lands in question; also of the charges which shall be made per acre upon the said entries, and upon lands in private ownership which may be irrigated by the waters of the said irrigation project, and the number of annual installments, not exceeding ten, in which such charges shall be paid and the time when such payments shall commence. The said charges shall be determined with a view of returning to the reclamation fund the estimated cost of

construction of the project, and shall be apportioned equitably.

Section 5 provides that the persons entering the lands to be irrigated as homesteads, in addition to complying with the homestead laws, must reclaim at least one-half of the irrigable areas of their respective entries, and before receiving patent shall pay to the Government "the charges apportioned against such tract as provided in section four." Also that no water right for land in private ownership shall be sold for more than 160 acres to any one landowner, "and no such right shall permanently attach until all payments therefor are made." The annual payments are to be made to the receiver of the land office within whose district the lands are situated "and a failure to make any two payments when due shall render the entry subject to cancellation, with the forfeiture of all rights under this act, as well as of any moneys already paid thereon." It also provides that "all moneys received from the above sources shall be paid into the reclamation fund."

Section 6 is as follows:

> That the Secretary of the Interior is hereby authorized and directed to use the reclamation fund for the operation and maintenance of all reservoirs and irrigation works constructed under the provisions of this act: *Provided*, That when the payments required by this act are made for the major portion of the lands irrigated from the waters of any of the works herein provided for, then the management and operation of such irrigation works shall pass

> to the owners of the lands irrigated thereby, to be maintained at their expense under such form of organization and under such rules and regulations as may be acceptable to the Secretary of the Interior: *Provided*, That the title to and the management and operation of the reservoirs and the works necessary for their protection and operation shall remain in the Government until otherwise provided by Congress.

Section 7 provides that when it becomes necessary "to acquire any rights or property," the Secretary of the Interior may acquire the same by purchase or condemnation, paying the expense from the reclamation fund.

Section 10 is as follows:

> The Secretary of the Interior is hereby authorized to perform any and all acts and to make such rules and regulations as may be necessary and proper for the purpose of carrying the provisions of this act into full force and effect.

The act of March 6, 1906 (34 Stat., 53), was designed to provide for the inclusion of surplus unallotted lands as well as allotted lands of the Yakima Indian Reservation, "under irrigation projects deemed practicable and undertaken under" the reclamation act. A previous statute had provided, among other things, for the appraisement of the surplus lands and the sale thereof to settlers. The act of 1906 amends that statute by providing that the lands found irrigable within any reclamation project shall be disposed of by homestead entries under the reclamation act, subject to the requirement that the appraised price be

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paid for the land as required by the former enactment. Section 2 provides, *inter alia:*

> Payments for the land shall be made in annual installments, the number and time of beginning being fixed by the Secretary of the Interior, and shall be deposited in the Treasury of the United States and credited to the Yakima Indian fund, and disposed of as provided by section 4 of the said Act of December 21, 1904. Such payments shall be in addition to the charges for *construction and maintenance of the irrigation system made payable into the reclamation fund by the provisions of the reclamation act.* In case of failure to make any payment for such lands when due the Secretary of the Interior shall have power to cancel the entry and the corresponding water right and declare forfeited to the said Yakima Indian fund and the reclamation fund, respectively, the amounts paid on such entry and water right. The lands embraced within such canceled entry shall be subject to further entry under the reclamation act at the appraised value until otherwise directed by the President, who may, by proclamation, as provided by said act of December 21, 1904, from time to time fix such price as he may deem most advantageous upon all lands within such projects not disposed of.

Section 3 provides that if any land heretofore allotted or patented to Indians of the Yakima Reservation shall be found irrigable under any project, the Secretary of the Interior may, with the consent of the allottee or patentee, dispose of all of it in ex-

cess of 20 acres in each case, subject to all of the provisions of the reclamation act, to any person qualified to acquire water rights under that statute, at a price satisfactory to the Indians and approved by the Secretary, or at public sale to the highest bidder. The payments for the land are to be made in annual installments, and the section then goes on to say:

> Such payments shall be in addition to the charges for construction and maintenance of the irrigation system made payable into the reclamation fund by the provisions of the reclamation act. In case of failure to make any payment for such lands when due or the charges under the reclamation act the Secretary of the Interior shall have power to cancel the entry and the corresponding water right and again dispose of the land in the manner hereinbefore provided.

Section 4 provides that from the payments received under section 3 there shall be covered into the reclamation fund "the amounts fixed by the Secretary of the Interior as the annual charges on account of the land retained by such Indian *for the construction and maintenance* of the irrigation system as required under the reclamation act." The balance is to be deposited to his individual credit, etc.

Section 5 authorizes the Secretary to cover into the reclamation fund from the Indian's money sufficient to pay the charges for "construction and maintenance" for the water rights appurtenant to

the land retained by him and for the "annual maintenance charges payable on account of such water rights after the construction charge thereon has been paid in full." It provides that when the fee has passed unconditionally to the lands retained by Indians, the water for irrigating the same shall be furnished under the same conditions in all respects as for other lands under the project; that any Indian taking advantage of the act shall have a perpetual water right "so long as the maintenance charges are paid"; that the funds of the tribe may be used by the Secretary to pay such charges, etc.

The Indian appropriation act of June 21, 1906 (34 Stat., 327), provides that any Indian holding allotted lands subject to restraints upon alienation within reclamation projects may sell any part of such lands, with the approval of the Secretary of the Interior, and that the consideration paid by the purchaser shall be placed in the treasury and used "to pay the construction charges that may be assessed against the unsold part of the allotment, and to pay the maintenance charges thereon during the trust period," etc.

The Indian appropriation act of March 1, 1907 (34 Stat., 1037), after making provision for the allotment of the Blackfeet Reservation, and the disposal of the surplus lands, etc., provides:

> That if, after the approval of the classification and appraisement, as provided herein, there shall be found lands within the limits of the reservation under irrigation projects

> deemed practicable under the provisions of the act of Congress approved June 17, 1902, known as the reclamation act, said lands shall be subject to withdrawal and be disposed of under the provisions of said act, and settlers shall pay, *in addition to the cost of construction and maintenance provided therein*, the appraised value, as provided in this act, to the proper officers, to be covered into the Treasury of the United States to the credit of the Indians.

An identical provision with reference to the lands of the Fort Peck Indian Reservation is contained in the act of May 30, 1908 (35 Stat., 558–562).

The act of April 30, 1908 (35 Stat., 85), contains the following:

> That in carrying out any irrigation project which may be undertaken under the provisions of the act of June 17, 1902 (32 Stat., p. 388), known as the reclamation act, and which may make possible and provide for, in connection with the reclamation of other lands, the irrigation of all or any part of the irrigable lands heretofore included in allotments made to Indians under the fourth section of the general allotment act, the Secretary of the Interior be, and he hereby is, authorized to make such arrangement and agreement in reference thereto as said Secretary deems for the best interest of the Indians: *Provided*, That no lien or charge for *construction, operation or maintenance* shall thereby be created against any such reserved lands.

This provision is reiterated in the act of March 3, 1909 (35 Stat., 798).

The act of June 25, 1910 (36 Stat., 835), in order "to enable the Secretary of the Interior to complete Government reclamation projects heretofore begun," allows the transfer to the reclamation fund of $20,000,000 from the Treasury, or so much thereof as the Secretary may deem necessary to complete said reclamation projects, etc. To raise the money needed the act authorizes the issuance and sale of certificates of indebtedness, but it provides that beginning five years after the date of the first advance to the reclamation fund, 50 per cent of the annual receipts of that fund shall be paid into the general fund of the Treasury until the payments shall equal the aggregate amount of advances with interest, etc.

The fourth section contains the following:

> That all money placed to the credit of the reclamation fund in pursuance of this act shall be devoted exclusively to the completion of work on reclamation projects heretofore begun as hereinbefore provided, and the same shall be included *with all other expenses in future estimates of construction, operation, or maintenance.*

The act of February 21, 1911 (36 Stat., 925), authorizes the Secretary of the Interior, whenever storage or carrying capacity has been provided in excess of the requirement of the lands to be irrigated under any reclamation project, to contract for the impounding, storage, and carriage of water to an

extent not exceeding the excess capacity to supply the needs of irrigation systems, individuals, corporations, etc., furnishing or distributing water for irrigation. This act declares that in fixing the charges under any such contract the Secretary "shall take into consideration the *cost of construction and maintenance* of the reservoir by which such water is to be impounded or stored and the canal by which it is to be carried, and such charges shall be just and equitable as to water users under the Government project."

The act of August 9, 1912 (ch. 278; 37 Stat., 265), provides, *in primis*, that homestead entrymen under the reclamation act, "including entrymen on ceded Indian lands," may obtain their patents, and that purchasers of water-right certificates (i. e., private land owners) may obtain their final water-right certificates, upon proof of compliance with conditions as to residence, reclamation, and cultivation, and upon paying all sums due to the United States on account of such lands or water rights, at the date of the issuance of the patent or certificate. By the second section a lien in favor of the United States upon the lands, as well as upon the water rights, is to be reserved, to secure the payment of all sums due or to become due to the United States, or its successors in control of the project, "in connection with such lands and water rights."

Section 3 thereupon provides:

> That upon full and final payment being made of all amounts due on account of the

> building and betterment charges to the United States or its successors in control of the project, the United States or its successors, as the case may be, shall issue upon request a certificate certifying that payment of the building and betterment charges in full has been made and that the lien upon the land has been so far satisfied and is no longer of any force or effect *except the lien for annual charges for operation and maintenance.*

Our investigations and information show that the practice of charging to water users the cost of maintenance and operation as well as the cost of building, began with the very first projects (Truckee-Carson in Nevada, and Minidoka in Idaho), which were thrown open under section 4 of the reclamation act, and has since been pursued without deviation in respect of those projects and all others. It is true that in the case of the Truckee-Carson project the original instructions of the Secretary and the Commissioner of the General Land Office, given in 1904 (33 L. D., 158, 159; ib., 190, 192), as to the form of the notice, and the notice actually served on settlers (5th Ann. Rep., Rec. Service, p. 202), did not separate the ingredients of the total charge per acre; and we are advised that the same thing was true of the Minidoka project. But in later notices (of May 6, 1907, and March 9, 1907), which superseded the earlier ones, such a separation was distinctly made, without, however, changing the total annual charge per acre. The Truckee-Carson notice of May 6, 1907, contained the following:

> The charges which shall be made per acre upon the said entries and upon lands in private ownership which can be irrigated by the waters of the said irrigation project, are in two parts, as follows:
>
> (1) The building of the irrigation system, $22 per acre, payable in not less than five, nor more than ten, annual installments, each not less than $2.20 per acre.
>
> (2) For operation and maintenance, which will, as soon as the data are available, be fixed in proportion to the amount of water used, with a minimum charge per acre whether water is used thereon or not. The operation and maintenance charges for the irrigation season of 1907 and until further notice will be 40 cents per acre of irrigable land. (7th Ann. Rep., p. 136.)

The Minidoka notice of May 9, 1907, is similar. (6th Ann. Rep., 86.)

Reference to the subsequent reports will show that the same separation of items has been made in all other cases.

There were three such notices for the Sunnyside unit, viz: November 18, 1908 (8th Ann. Rep., 198); March 2, 1909 (ib., 200); and March 15, 1911 (10th Ann. Rep., 235). The first and last of these are printed in full in the record (R., 17 and 12) as exhibits to certain affidavits used on the motion for injunction. The record also contains a copy of plaintiff's application of May 22, 1911, in which he expressly agreed to pay the charges for maintenance and operation (R., 14).

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The total of the estimated receipts of the reclamation fund coming from the sales of public lands from the date of the reclamation act to June 30, 1911, was $77,612,201.41. During the same period the net amount expended from that fund was $68,823,171.56. (Report of Sec. Int., 1912, p. 44.) The total cost of maintenance and operation was $1,164,327.61. (11th Ann. Rep. 18.) The collections from water users were, on account of building, $2,156,442.75, and on account of maintenance and operation, $877,825.82. (Ib., p. 273.)

The total cost of the Sunnyside unit to June 30, 1912, was $2,721,101.11, of which $376,436.43 was for operation and maintenance. (Ib., 191.) Of these sums there had been collected on that date $394,117.52 on account of building and $78,714.48 on account of operation and maintenance. (Ib., p. 274.)

The practice of charging for operation and maintenance has been brought to the attention of Congress repeatedly and in instances almost countless ever since the occasion to make collections from water users arose. Aside from the public notoriety of it and its discussion at hearings before committees, this practice has been clearly revealed year after year in the annual reports, not only by the reproduction of the public notices to which we have referred, but also in detailed fiscal statements, giving the amounts charged and actually collected, both generally and in respect of each individual project. Items

of this sort appear in the report of 1907, and increasingly in every one subsequent.

SPECIFICATION OF ERROR.

The error relied on is the error in reversing the case because of the supposed illegality of the maintenance and operation charge.

ARGUMENT

I.

The right and duty of the Secretary to collect the cost of maintenance and operation are deducible from the reclamation act; or, to say the least, are not clearly precluded by its terms.

It was expressly so decided in *United States* v. *Cantrall*, 176 Fed., 949.

Those portions of the act which were relied on by the court below as inhibiting the collection of the charges in question, are:

First. The provision in section 4, that "the said charges shall be determined with a view of returning to the reclamation fund the estimated cost of construction of the project, and shall be apportioned equitably," which, in the opinion of the court, "precludes the reading into that section the further cost 'of operation and maintenance' of the system." (R. 51).

Second. The provision in section 5 that an entryman, "before receiving patent for the lands covered by his entry shall pay to the Government the charges

apportioned against such tract, as provided in section 4."

Third. That portion of section 1 which declares that the reclamation fund shall be "used in the examination and survey for and the construction and maintenance of irrigation works * * * and for the payment of all other expenses provided for in this act."

Fourth. The provisions of section 6, authorizing and directing the Secretary "to use the reclamation fund" for maintenance and operation, with the proviso "that when the payments required by this act are made for the major portion of the lands irrigated * * * then the management and operation * * * shall pass to the owners of the lands irrigated thereby, to be maintained at their expense," etc.

The court contents itself with the quotation of these provisions without analysis or explanation, apparently conceiving that the mere perusal will suffice to show conclusively that the cost of maintenance and operation is not to be collected ultimately from the settlers and private landowners, but must be borne by the United States. Apparently, there were three propositions accepted by the court as the basis of its conclusion: First, that the words "construction of the project" in section 4 must be literally confined to the operations of putting together or building the irrigation works and can not be extended to the operations incident to the upkeep and use pending

the time of their delivery to the water users. Second, that because by section 5 before an entryman may obtain his patent (or a private landowner his permanent water right) the charges provided in section 4 (i. e. "construction" charges) must be paid he is necessarily relieved from all other charges incident to his use of the water, and third, that because by section 6 the Secretary is directed to "use the reclamation fund" until the required payments have been made for the major portion of the irrigated lands, and thereafter the management and operation shall pass to the landowners, "to be maintained at their expense," therefore Congress intended to donate to those landowners the enormous sums required to maintain and operate the works before the change of management.

We will consider these propositions in the light of certain general principles of construction and the character of the subject matter.

1. As was said by this court in *American Tobacco Co.* v. *Werckmeister* (207 U. S., 284, 293):

> In construing a statute we are not always confined to a literal reading, and may consider its object and purpose, the things with which it is dealing, and the condition of affairs which led to its enactment so as to effectuate rather than destroy the spirit and force of the law which the legislature intended to enact.
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> *United States* v. *Lacher* (134 U. S., 624, 628).
> *United States* v. *Freeman* (3 How., 556, 565).
> *People* v. *LaCombe* (99 N. Y., 43, 49).

> It is a familiar rule, that a thing may be within the letter of the statute and yet not within the statute, because not within its spirit nor within the intention of its makers. This has been often asserted, and the reports are full of cases illustrating its application. This is not the substitution of the will of the judge for that of the legislator, for frequently words of general meaning are used in a statute, words broad enough to include an act in question, and yet a consideration of the whole legislation, or of the circumstances surrounding its enactment, or of the absurd results which follow from giving such broad meaning to the words, makes it unreasonable to believe that the legislator intended to include the particular act.
>
> *Church of the Holy Trinity* v. *United States*, 143 U. S., 457, 459.

This is not a principle to be employed casually, or in special cases only. Its workings are ever present and controlling in every intelligent and lawyerlike effort to arrive at the meaning of a statute. Of course, the words which the legislature has employed are, in the first instance, to be taken in their common or literal sense, and that is the sense which preferably should be adopted by the courts; but it is entirely sound to say that it should never be adopted finally without first consulting the entire enactment, and comparing one part with another in the light of the conditions and circumstances out of which it was evolved, to the end that the dominating spirit and

purpose may be revealed, and the whole statute read in harmony with them if possible.

> The foregoing elementary rule of [literal] construction does not carry the interpreter far; for it is confined to cases where the language is precise and capable of but one construction, or where neither the history or cause of the enactment, nor the context, nor the consequences to which the literal interpretation would lead, show that that interpretation does not express the real intention.
>
> But it is another elementary rule, that a thing which is within the letter of a statute will, generally, be construed as not within the statute unless it be also within the real intention of the Legislature, and the words, if sufficiently flexible, must be construed in the sense which, if less correct grammatically, is more in harmony with that intention. Language is rarely so free from ambiguity as to be incapable of being used in more than one sense; and to adhere rigidly to its literal and primary meaning in all cases would be to miss its real meaning in many.
>
> Maxwell, Interpretation of Statutes, 5th ed., p. 30.

The majority opinion of the court below displays a most remarkable misconception of the part played by this all-important principle in the effectuation of the written laws. In perusing it one feels that, to the mind of its author, a statute is not an organic whole but a congeries of independent parts, and that the general purpose is but a secondary adjuvant, to be

held in reserve and not to be resorted to or considered, unless the literal meaning of the particular part considered, tested by the rules of grammar and the common understanding of terms, is in itself ambiguous. The reverse is true. The literal meaning is never ultimately controlling, unless the language be so rigid and so clear as to demonstrate its own exclusiveness, despite its apparent lack of harmony with the other provisions and the general purport of the law. Such instances in statutes of the kind now under discussion must be extremely rare.

2. In testing the correctness of the court's conclusions particular attention should be directed to the result of their acceptance—the appropriation of millions of dollars of public moneys for the immediate benefit of private landowners and entrymen; and due weight should constantly be given to the rule of strict interpretation, which is always to be applied in such cases, in favor of the Government.

In the case of *Leavenworth, etc., R. Co.* v. *United States* (92 U. S., 733), the court, construing a railway grant, and quoting from *The Dubuque & Pacific R. Co.* v. *Litchfield* (23 How., 66), said (p. 740):

> "All grants of this description are strictly construed against the grantees; nothing passes but what is conveyed in clear and explicit language; and, as the rights here claimed are derived entirely from the act of Congress, the donation stands on the same footing of a grant by the public to a private company, the terms of which must be plainly expressed

> in the statute, and, if not thus expressed, they can not be implied."
>
> This grant, like that to Iowa, was made for the purpose of aiding a work of internal improvement, and does not extend beyond the intent it expresses.

In *Coosaw Min. Co.* v. *South Carolina* (144 U. S., 550, 562), the court said:

> Only that which is granted in clear and explicit terms passes by a grant of property, franchises or privileges in which the government or the public has an interest. * * * Statutory grants, of that character, are to be construed strictly in favor of the public, and whatever is not unequivocally granted is withheld; nothing passes by mere implication.
>
> See, also, *Slidell* v. *Grandjean*, 111 U. S., 412, 438; *United States* v. *Michigan*, 190 U. S., 379, 401.

3. The expression "cost of construction of the project" may not unreasonably be extended so as to include the cost of maintenance and operation.

The word "construction" has no hard and fast meaning. It is susceptible of a broad and comprehensive interpretation. This was well pointed out by Judge Gilbert, who gave a number of apt illustrations. We quote from his dissenting opinion (R., 55):

> I submit that the words "construction of the project" are used in a broad and comprehensive sense, and that they mean the construction, repair, and maintenance of the

project until it shall be turned over to the beneficiaries thereof under the provisions of section 6. The construction of an irrigation system thereafter to be delivered to others may fairly be said to involve the maintenance thereof until the time of delivery. Such maintenance and keeping in repair is included in the construction. The maintenance is the holding together that which is put together in construction. The word "construction" as used in statutes has often been given such a meaning. Under a statute authorizing the issuance of bonds for "constructing public roads" it was held that the term "constructing" was used in a comprehensive sense, and meant not merely the construction of new roads but meant the maintenance and betterment of roads already in existence. (*Western* v. *Hancock County*, 54 So., 307.) So it was held under a statute authorizing cities and towns to "construct waterworks and light plants" that the words conferred authority to purchase waterworks and light plants already constructed by private enterprise. (*Seymour* v. *City of Tacoma*, 32 Pac., 1077.) And in construing an act which authorized the city of Brooklyn to "construct" a sewer, the court said: "Nor do we think that the phrases 'to construct' and 'to be constructed' are in the purview of this act to be confined to the bare cost of building a sewer. Doubtless to construct is primarily to form, to build together: and the power to construct may in many cases end when the work of building is done. But here the power to construct is the

> power to keep together as well as the power to put together, the power to maintain, protect, and preserve, as well as the power to erect." (Matter of application of Fowler, 53 N. Y., 60.)

Seymour v. *Tacoma* (6 Wash., 138), cited by Judge Gilbert, holds that the title of an act which reads, "An act authorizing cities and towns to *construct* internal improvements," etc., is sufficiently broad to cover a provision authorizing the purchase of waterworks and light plants already erected by private enterprise. The court says (p. 147):

> Ordinarily the meaning of the word "construct" in the sense here meant would be to build or make; but to give the law any effect whatever, it must have been known to the legislature that more than the mere cost of construction involving the labor necessary would have to be implied. * In making every such improvement, the machinery and piping must be purchased, and they constitute a very large proportion of the cost. But that is not all. In building systems of waterworks especially two other things must be looked after, unless the cities for which they are provided lie immediately upon the lake or stream which furnishes the source of supply; these are the right to take water, and the necessary land for rights of way, reservoirs and buildings for machinery.
>
> If one should contract with another for the construction of a house, no one would suppose for a moment that the agreement to "con-

> struct" implied an agreement to furnish the land whereon the house must stand; but a gross contract to "construct" a system of waterworks for the city of Tacoma, with Green river as a source of supply, and turn it over ready for operation, would certainly imply that when the works were finished the perpetual right to have them remain where they were, with the waters of Green river flowing into them, should be secured to the city. Thus, under this power to construct, all but the mere labor would be accomplished by purchase in most cases, and there would seem to be no good reason why water rights, land, pipes and machinery should not be purchased, although they be already in use for a like purpose. The labor only is, therefore, left unprovided for.

In *Attorney General* v. *Boston* (142 Mass., 200, 204), it was held that a general power "to construct" sidewalks authorized the city authorities to remove and dispense with them.

In *Town of Pelham* (16 Fed., 418), District Judge Brown was of opinion that in a local act whose purpose, according to its title, was to authorize a town "to raise money for the purpose of constructing a town dock," it was competent for the legislature, without violating a constitutional provision that the subject of such an act must be expressed in its title, to authorize the town to *maintain* the dock when erected and collect *wharfage* for its use.

Bell v. *Maish* (137 Ind., 226) held that an amendment providing for county aid in the "reconstruc-

tion" of railroads fell within the title of the original act which was "to authorize aid to the *construction* of railroads," etc.

In *Atchison, Topeka & Santa Fe R. Co.* v. *McConnell* (25 Kans., 370, 372), it was held that the term "construction" in a law of Kansas relating to the recovery of compensation for services rendered by a contractor to a railroad in the construction of its road, or any part thereof, includes the removal of an old bridge in supplying its place with a larger one.

The ultimate object of Congress was not merely to build irrigation works as a contractor would build them for a private owner, to be delivered to him immediately upon completion. The scheme of the statute required that the Government, through the Secretary of the Interior, after careful surveys and examinations, should devise and execute reclamation projects of which the irrigation works, though the principal, were to be by no means the only elements. Numerous expenses were involved besides the expense of excavating and assembling materials. Elaborate and expensive examinations, and surveys, with the necessary maps, plans, estimates, specifications, etc., were contemplated, and the cost of these has been heavy, as the reports will show. Under section 9, rights of property, such, for example, as sites for dams, rights of way for roads and canals, and *water rights* (in special cases), must be purchased or condemned. For these also a heavy outlay has been made. When the works were ready for use,

they were not then to be turned over to the landowners, but the Government was still to maintain and operate them until full payment had been made, for 10 years, perhaps, or even longer. The end of the scheme, in each case, was to occur with the induction of the water users into the ownership and management of a live and going enterprise—an executed or "constructed" project. The word "project" denotes a mental conception—a plan or scheme—and can not be appropriately used to designate a physical object. Literally, the "construction of a project" is an operation of the mind—which goes to show the looseness of the language we are considering, and the need of finding an interpretation which shall accord with the spirit of the statute. If "construction" be read liberally in the sense of "execution," the normal meaning of the word "project" is preserved.

On the other hand, assuming that the term "project" is used in the sense of "works" rather than as denoting the whole scheme, it is evident that if "cost of construction" were interpreted narrowly it would exclude many important items of expense, other than maintenance and operation, which enter inevitably into the total outlay. Among these are the surveying and engineering expenses which precede the actual building, the purchases of property (including in some cases water rights and dams or canals already made) and numerous charges for general superintendence and administration. There is no reason for supposing that Congress intended these

heavy burdens to be borne by the Government; the presumption is directly the reverse.

Looked back on from the time of delivery to the water users, the maintenance of the works is but a part of the construction. It is a continuation of the original construction, occasioned by the postponement of delivery, and unavoidable if the plant is to be delivered, not imperfect and deteriorated, but in complete working order, as the statute intends it shall be. Maintenance comprises the protection and care of the plant as a whole, with necessary replacements and repairs. When this is paid for, very little additional expense would be involved in the mere "operation." Indeed, it would be very difficult, if not impossible, to separate the expense of operation alone, or to draw a line between those acts of operation which are performed purely for the purpose of utilizing the plant and those which are experimental in character or otherwise necessary to the perfect execution of the project. Perhaps in no other class of works does use bear so essential a relation to completion as in irrigation works. It is well known that the full efficiency of reservoirs, and particularly of irrigation canals, may not be attained until after they have been filled with water for long periods of time, since much of the water is lost at first through the porousness of the soil, which the action of the water and its sediments tends gradually to overcome, and various other leaks and defects impossible to foresee are ultimately revealed by the impounded or

flowing waters. Operation, then, is a necessary incident to complete construction. And there are other reasons why this is true, especially of great projects like those undertaken by the Government. The irrigated lands, being extremely arid, drink up vast quantities of water during the earlier years of irrigation. As, in course of time, more and more farms are brought into use, so that the total area of irrigated land becomes very large—each acre consuming more water than it will ultimately require—the water table everywhere slowly rises until, not infrequently, the lower lands grow water soaked and swampy. To remedy this condition, drainage systems may be required, and the use of water may and should be generally diminished. Another result is, that as the older lands require less irrigation, new lands may be brought within the project without increasing the water supply. It is necessary, therefore, for the Secretary to operate the projects for some time (and how long would doubtless depend on the conditions of each case) in order to test and complete them. We point this out as showing the intimate relations between construction and maintenance with operation, and how the third, like the second, may not improperly be regarded as an element in the first. Of course we should not say this of the regular operation by the water users which is to follow the completion of the project; but, in the case of the Government, operation is tentative and temporary, and is more to be treated as involved in the completion than as the object and end of it.

No attempt to distinguish between maintenance and operation was made in the courts below, and we anticipate that none will be made here.

4. *Conceding, for the sake of the argument, that the cost referred to in the fourth section includes only what may be termed the original cost of irrigation works, it by no means follows that authority to collect the cost of maintenance and operation is ipso facto excluded.*

The charges apportioned under section four may be regarded as constituting the consideration exacted for the *purchase* of the water rights and, ultimately, the irrigation system; and this, it may be argued, is what Congress had in mind in directing the Secretary to apportion the charges and describe them in the public notice. Prospective settlers would thus be informed of the price which they must pay for *water rights*, as well as of the terms of payment. But the cost of maintenance and operation is the necessary concomitant of the *enjoyment* of all water rights, whether they be paid for or not, and forms no part of the consideration for which they are acquired. The payment of this cost by the water users is to be assumed in every irrigation enterprise.

In private enterprises, as is well known, it has long been common practice to provide for the sale of the water rights (often with lands) in installments, upon the stipulation that when all, or a certain proportion, have been paid for, the management and title of the irrigation plant shall pass to the water users. This plan was copied in the reclamation act. In such

enterprises it is the normal, if not invariable, rule to assess the cost of maintenance and operation (a variable quantity) annually against the water users before they have perfected their titles; and the water users perforce assess themselves in the same way after they have taken over the management. What is normal and necessary in a private enterprise certainly does not become unreasonable and unnecessary because the enterprise is put on its feet by the use of public money.

The tenth section of the act empowers the Secretary "to perform any and all acts and to make such rules and regulations as may be necessary and proper for the purpose of carrying the provisions of this act into full force and effect." This affords abundant authority for the rules which the Secretary has adopted to insure the collection of the charges, unless the charges themselves are expressly or impliedly forbidden by the act.

To defeat the charges it would not be enough to show that the statute did not provide for them expressly. The rule is quite the other way. "In other words, what is not given expressly or by necessary implication is withheld." (*Leavenworth, etc., R. Co.* v. *United States*, 92 U. S., p. 740.) All the implications in every case are strongly against a construction which leads to the irrevocable expenditure of large sums of public money for the private benefit of individuals, and here those implications are strengthened by the general purport of the stat-

ute, the conditions which gave rise to it, and the expositions of its theory which were laid before Congress by the committee which framed the legislation, all going to show conclusively that the dominant object was not to extend charity to the helpless but to reclaim the arid public lands, so far as this could possibly be done, through temporary and repeated lendings of money from the reclamation fund; and that the fund was to be preserved and ultimately returned to the Treasury substantially undiminished.

As above indicated, two features of the act seem to have been accepted by the court below as precluding these charges: First, the provision in section 5 that the entryman, before receiving *patent for his lands*, shall, among other things, pay the charges mentioned in section 4; and, second, the provisions in section 6, directing the use of the reclamation fund for maintenance and operation, and providing that when the payments for the major portion of the lands have been made the management and operation of the works shall pass to the landowners, "to be maintained at their expense."

(*a*) As to the provision in section 5 it suffices to observe:

(1) That it does not purport to specify *all* the charges which an entryman may be required to pay before obtaining a patent to his land.

(2) That it relates only to the title to his land. It may be a reasonable but it is not a necessary infer-

ence that the water right is to accompany the patent, but surely the language does not, expressly or impliedly, forbid collection of the cost necessarily incident to the use of water.

(3) Section 5 also declares:

> *No right to the use of water* for land in private ownership shall be sold for a tract exceeding one hundred and sixty acres to any one landowner, and no such sale shall be made to any landowner unless he be an actual bona fide resident on such land, or occupant thereof residing in the neighborhood of said land, and *no such right shall permanently attach until all payments therefor are made.*

Doubtless it will be argued that the payments here referred to include only the payments required of private landowners, and that, to avoid discrimination in favor of the entrymen, these payments must be confined to the class of charges "provided in section four." But this would be accumulating favorable inferences rather than construing the language strictly. The words "no such right" may be correlated with the words "right to the use of water," at the beginning of the sentence; which would bring out logically the distinction between *water rights*—a subject matter in which private landowners and entrymen are alike concerned—and *patents*, in which only the latter are interested.

The section is obscure and very loosely drawn and subject to different possible interpretations; but the important feature is that neither expressly nor by

necessary intendment can it be said to forego the right to collect the charges now in controversy.

(*b*) We come now to section 6. It would be the loosest kind of reasoning to conclude, because, after the change of management of the works the maintenance and operation are to be "at the expense" of the landowners, *ergo*, before that time they must be "at the expense" of the Government. The section does not say this. It says that before the change of management the works are to be operated and maintained by the *use* of the reclamation fund. The argument begs the question entirely. The whole question in the case is: What is implied in the use of the fund? Is it a temporary advancement, in the nature of a loan, or an irrevocable outlay of public money partaking of the nature of a donation? The first section declares that the fund shall "be used in the examination and survey for and the construction and maintenance of irrigation works * * * for the reclamation of * * * lands * * * and for the payment of all other expenditures provided for in this Act." We know, from section 4, that the use for "construction," which certainly includes nearly all of the things which are specified in this enumeration, is in the way of a revocable investment, and, in the absence of controlling reasons to the contrary, this quality must characterize all other uses. The most that can be said for section 6 is that it does not *affirmatively* lay upon the water users the duty of reimbursing the reclamation fund.

II.

The explanations of the Reclamation Act made to Congress at the time of its passage, the continuous and consistent construction of it by the Executive in enforcing it, and the subsequent legislation of Congress in amending and extending it, unite in upholding the charges in question. The construction thus placed upon the enactment should be adopted by the court.

1. Not doubting our right to refer to them (*Binns* v. *United States*, 194 U. S., 486, 495; *Houghton* v. *Payne*, *ib.*, 88, 101; *Blake* v. *Nat. Banks*, 90 U. S., 307, 317), we have incorporated in the appendix to this brief such extracts, from the reports and oral explanations made by the committees of the House and Senate having this legislation in charge, as bear upon the point in controversy. The Senate report, *infra*, p. 58, states that by means of the annual payments "the fund will constantly be replenished, making irrigation practically a self-sustaining enterprise and, according to estimates by the Geological Survey, ultimately putting money into the Treasury." And that "the entryman shall reclaim such lands for agricultural purposes, and shall pay all charges before receiving patent."

Senator Hansbrough, a member of the committee, in explaining the bill, said, among other things, *infra*, p. 59:

> The advocates of a national irrigation policy submit a plan whereby large areas of land, now practically worthless, may be opened, not at Government expense, but at a cost to be assessed against the land * * *.

> It is provided in the bill that the cost of construction of each irrigation project shall be paid by the persons directly benefited. Thus the money expended would constantly be recouped or repaid to the reclamation fund, making the system automatic and self-sustaining.

The House report is very lengthy. From the parts printed in the appendix we excerpt the following (*infra*, p. 60):

> Further, the bill is intended to supplement rather than usurp the domain of private and cooperative enterprise. The payment by the settler of the cost of reclamation eliminates all danger of ruinous competition with the smaller and less complicated works which may be so undertaken, and there can be no doubt that such development will be stimulated by the work carried on by the Government and the greater proportion of irrigation reclamation be undertaken and accomplished by private enterprise * * *.
>
> The opponents of this measure have claimed that it would lead to a vast expenditure by the General Government, and the most exaggerated statements have been made as to probable aggregate outlay. It should be borne in mind that it is not proposed to take a penny for the work contemplated out of the public Treasury. Provision is made whereby the arid region shall reclaim itself by utilizing the sale of public lands there for that purpose. By no possibility can the expenditures under the bill exceed the proceeds of the sales of the

public lands in the region affected by the bill, and this is by no means a direct expenditure, but is rather in the nature of a loan, inasmuch as *the settler is to pay to the Government the cost of the reclamation* of his land, and in this way the money paid out for the construction of works is returned to the Treasury; therefore all of the extravagant estimates which have been made by the critics of the measure as to the cost to the Government under its operations have been erroneous and misleading. It is true that if the bill becomes a law and works satisfactorily, in the course of time a large sum of money will be spent by the Government in the construction of irrigation works, but under the provisions of the bill *all of these sums are to be repaid*, so that the reclamation fund, instead of decreasing, will constantly increase. *The only actual expenditure under the bill not reimbursable would be certain items of administration, surveys,* and examinations of projects, the construction of *which, for one reason or another, might not be undertaken* * * *.

Briefly, then, the entire outlay by the Federal Government is limited to the proceeds of the sales of public lands in the region benefited; *all of this amount is reimbursable under the terms of the bill* except a limited expense for administration, surveys, and examinations, and there is very little probability of there being any effort made to modify the feature of the measure providing for reimbursement to the Government of the money expended in the construction of irrigation works, because such modifi-

> cation would be detrimental to the interests of the people most interested in the measure.

Mr. Mondell, who reported the bill for the committee, in the course of an elaborate explanation substantially repeated the statements which we have quoted from the report. Among other things, he added (*infra*, p. 64):

> Following the usual custom in the arid region, it is provided that when payments are made on a major portion of the lands to be irrigated from any project the management of and maintenance thereof, at their own expense, shall pass to the owners of the land irrigated, under such rules and regulations as the Secretary of the Interior may prescribe, and at this time the Government is relieved from all further expense in the maintenance of the distributing works * * *. This is not a proposition to use the public revenues for the work of developing the arid region. If it were, and *in the form of a loan, reimbursable as under the provisions of the bill*, I can not understand how it would be any more subject to the objection, etc.

Mr. Underwood said (*infra*, p. 68):

> If this bill works out, and you go on and build these reservoirs, and you sell the lands that are adjacent to the reservoirs, and the money comes back into the fund, ultimately, if the scheme works out and is correct, you will have finished all the reservoirs and you will have your fund left that can be used for school purposes, and the only way you will

> get a fund out of these arid lands for the carrying on of the appropriations for these schools is in that way.

Mr. Reeder said (*infra*, p. 69):

> The idea that the charges upon the land for the construction of the irrigation works will be finally remitted by the Government is another wrong conception. The settlers on these lands will be getting water from the Government works each year, and during the time they will be paying for their water rights they will much prefer that the Government should continue in charge of the system. And, more than this, the whole sentiment of the West will oppose any diminution of the fund, because the general development of that great country will be speeded by maintaining the fund intact and getting it back for reinvestment from each system of works that is built.

Mr. Ray, being a minority member of the committee and not from a public-land state, his remarks naturally would have little influence with members toward overcoming the explanation of the bill made in the majority report.

From the foregoing (and the fact is emphasized by a full reading of the reports and debates) it is too obvious for discussion that the bill was expounded by the committees, and therefore presumably was understood by the majority in both Houses when it passed, as providing for the repeated use and constant return of the fund, and, ultimately, its delivery, substantially undiminished, to the Treasury.

2. Regarding the influence of executive construction in deciding the meaning of a doubtful statute, the decisions of this court have been too frequent and emphatic to justify extensive citation.

> The principle that the contemporaneous construction of a statute by the executive officers of the government, whose duty it is to execute it, is entitled to great respect, and should ordinarily control the construction of the statute by the courts, is so firmly imbedded in our jurisprudence, that no authorities need be cited to support it. On the faith of a construction thus adopted, rights of property grow up which ought not to be ruthlessly swept aside, unless some great public measure, benefit, or right is involved, or unless the construction itself is manifestly incorrect.
>
> *Pennoyer* v. *McConnaughy*, 140 U. S., 1, 23.
> *United States* v. *Moore*, 95 U. S., 760, 763.

As was pointed out in some detail in our statement of facts, the practice of making charges for operation and maintenance dates from 1906 or 1907, when the first project was thrown open, and has continued ever since. Notice after notice has been issued, application after application has been made and approved, hundreds of thousands of dollars have been actually collected, and, it may properly be said, the whole great scheme of reclamation—the apportionment of funds, the laying out of future work, even the appropriation and assignment of the $20,000,000 provided by the act of June 25, 1910—has been arranged and

adjusted upon the faith of this practice. The practice was definitely passed on and approved by the Attorney General in his opinion of May 26, 1909 (27 Op., 360, 367). More than this, it has been brought to the attention of Congress again and again in the annual reports and in many other ways, and Congress has never indicated the slightest desire to disapprove of it.

> This construction of the department has been followed for many years, without any attempt of Congress to change it. * * * When there has been a long acquiescence in a regulation, and by it rights of parties for many years have been determined and adjusted, it is not to be disregarded without the most cogent and persuasive reasons.
>
> *Robertson* v. *Downing*, 127 U. S., 607, 613.

3. The legislative construction attended from the beginning, if it did not really precede, the practice of the department, and is no less clear and continuous. The evidence of this is found in nine acts of Congress, dating from 1906 to 1912, which are reviewed in our statement of facts, *supra*, pages 14 to 17.

The act of March 6, 1906 (34 Stat., 53), is strictly *in pari materia* with the reclamation act. It provides for subjecting to the provisions of that statute, where practicable, the irrigable areas of Indian reservations, not merely the lands appertaining to individual Indians, and which they may desire to retain, but especially the surplus lands which have not been allotted and the portions of allotments

which the allottees do not need. These are to be sold at appraised value and the proceeds duly accounted for, but in all other respects they are given the status of public lands within reclamation projects, and the conditions under which they may be acquired are to be determined accordingly. The act declares that the payments of appraisal value by settlers "shall be in addition to the charges for construction and maintenance of the irrigation system made payable *into the reclamation fund* by the provisions of the reclamation act," and, in respect of lands retained by Indians, directs the Secretary to pay *into that fund*, out of the Indians' money, "the amounts fixed by the Secretary of the Interior as the annual charges * * * for the construction and maintenance of the irrigation system as required under the reclamation act."

It would be difficult to conceive of a plainer declaration upon the very point at issue in this case. This statute, it will be observed, preceded the first of the public notices in which the separation of charges was expressly made; and it left nothing to the Secretary but to inaugurate the practice of collecting for maintenance if he had not already adopted it. The act of June 21, 1906 (34 Stat. 327), again recognizes the "maintenance charges," requiring them to be paid on land of individual Indians. By the acts of March 1, 1907 (34 Stat., 1037), and May 30, 1908 (35 Stat., 562), surplus lands of the Blackfeet and Fort Peck Reservations within reclamation projects may be disposed

of to settlers under the reclamation act, the settlers paying "in addition to the cost of maintenance and construction provided therein," the appraised value. The acts of April 30, 1908 (35 Stat., 85), and March 3, 1909 (ib., 799), allow the Secretary to arrange for the irrigation of Indian allotments through reclamation projects, provided "that no lien or *charge for construction, operation or maintenance* shall thereby be created against any such reserved lands."

All of the statutes thus far mentioned preceded the plaintiff's application for water right, which occurred not earlier than August, 1909.

The act of June 25, 1910 (36 Stat., 835), authorizing $20,000,000 to be transferred to the reclamation fund for the purpose of completing existing projects with the requirement that it be repaid to the Treasury, provides that the money so used "shall be included with all other expenses in future estimates of *construction, operation, or maintenance.*"

The object of this provision was to insure the return to the Treasury of the money advanced under the act, and the estimates referred to are the estimates of cost which under the reclamation act the Secretary of the Interior is required to make and apportion for future collection from the water users. This statute, therefore, imports a distinct recognition of the duty of the Secretary to charge for operation and maintenance as well as for construction in the narrower sense contended for by the plaintiff.

The act of February 21, 1911 (36 Stat., 925), authorizing the Secretary to make use of any surplus

capacity of reclamation works in the supplying of water to other irrigation systems, directs that in fixing the charges under the contracts he "shall take into consideration the cost of *construction and maintenance*" of the Government works, "and such charges shall be just and equitable as to water users under the Government project."

The act of August 9, 1912 (37 Stat., 265), provides that patents and final water-right certificates may issue prior to full payment, reserving a lien to secure the United States for sums to become due in the future. The lien may be discharged *pro tanto* by subsequent payment of all amounts due on account of "building and betterment charges," but is thereafter to remain in force as a lien for "*annual charges for operation and maintenance.*"

There can be no doubt that Congress in enacting the above-mentioned laws, from the act of 1906 to the act of 1912, considered that the maintenance charges were not only payable from, but also recoverable to, the reclamation fund. The act of April 30, 1908, and the acts subsequent, specifically mention also the charge for operation. Congress had been repeatedly advised of the nature and extent of these charges by the reports of the Secretary of the Interior, and it enacted this legislation with its eyes fully open, making use of language in which no one could fail to see both the approval of the practice and the belief that it was authorized by the original law. These acts are all *in pari materia* and must be

considered together as a system of legislation, in order that each part, so far as possible, may harmonize with all the others. In the application of this fundamental principle it is well settled that resort may be had to the later enactments for the purpose of shedding light upon the earlier.

> The correct rule of interpretation is, that if divers statutes relate to the same thing, they ought all to be taken into consideration in construing any one of them, and it is an established rule of law, that all acts *in pari materia* are to be taken together, as if they were one law. * * * If a thing contained in a subsequent statute be within the reason of a former statute, it shall be taken to be within the meaning of that statute; * * * and if it can be gathered from a subsequent statute *in pari materia*, what meaning the legislature attached to the words of a former statute, they will amount to a legislative declaration of its meaning, and will govern the construction of the first statute.
>
> *United States* v. *Freeman*, 3 How., 556, 564.

A case peculiarly in point is *Alexander* v. *Alexandria* (5 Cranch, 1). An act of Virginia incorporating the town of Alexandria conferred various powers, such as the power to erect public buildings and govern the town, for the effectuation of which revenues would be required, but made no express provision for the assessment of taxes beyond empowering the authorities "to assess the inhabitants for the use and repairing of streets and highways." In a suit by the town,

judgment was rendered against Alexander, a nonresident, for taxes assessed for paving purposes against certain lots which he owned within the town limits. We quote the following from the opinion of Chief Justice Marshall (p. 7):

> For the plaintiff it is contended, that the power of taxation, here given, is, in terms, confined to assessments made on the inhabitants. On the part of the defendants, it is urged, that the express power to assess the inhabitants is for the sole purpose of improving their streets, and that an express power is also given to make expensive establishments, the means of erecting which could be furnished only by taxes; that the power to make by-laws must, therefore, necessarily be construed to involve the power of taxing, at least, for these objects.
>
> Without deciding this question, as depending merely on the original law, it is to be observed, that acts *in pari materia* are to be construed together as forming one act. If, in a subsequent clause of the same act, provisions are introduced, which show the sense in which the legislature employed doubtful phrases previously used, that sense is to be adopted in construing those phrases. Consequently, if a subsequent act on the same subject affords complete demonstration of the legislative sense of its own language, the rule which has been stated, requiring that the subsequent should be incorporated into the foregoing act, is a direction to courts in expounding the provisions of the law.

The act of the 16th of December 1796, contains this clause: "It shall and may be lawful for the mayor and commonalty of the town of Alexandria to recover, of and from all and every person or persons holding land within the limits of the said town, and who have no other property within the said town on which the taxes or assessments imposed on such property, for paving the streets therein, can be levied, the amount of such taxes or assessments, by motion in the court of the county or corporation where such person or persons reside."

This clause most obviously contemplates a full right to assess taxes on property lying within the town and belonging to nonresidents; for it gives a right to recover such assessment in the court of any county or corporation in which the owner of such property may reside. It is either a legislative exposition of a power formerly granted, or the grant of a new power.

See also *Johnson* v. *Southern Pacific* (196 U. S., 1); *Cope* v. *Cope* (137 U. S., 682, 687).

III.

If the power to make the charges in controversy was withheld by the reclamation act, the subsequent legislation conferred it by amendment.

Both in principle and authority it may be taken to be established, that a legislative body may by statute declare the construction of previous statutes so as to bind the courts in reference to all transactions occurring after the passage of the law, and may in

> many cases thus furnish the rule to govern the courts in transactions which are past, provided no constitutional right of the party concerned is violated.
>
> *Stockdale* v. *Insurance Cos.*, 20 Wall., 323, 331.

The purpose being evident, the form of words employed by the legislature to express it is of course immaterial. (Ib., 332.)

The requirement of the act of March 6, 1906, *supra*, that the settlers pay and the Secretary collect the appraised value of lands "in addition to the charges for construction and maintenance * * * made payable into the reclamation fund by the * * * reclamation act," and the like requirements in the acts of March 1, 1907, and May 30, 1908, were in effect commands that charges for maintenance be collected in addition to the appraised value. But more than this, the charges must be charges collectible under the reclamation act and payable into the reclamation fund, in accordance with the reclamation act. The language can not be explained away and disregarded as an expression of an erroneous opinion concerning the existing law. The duty to give life and meaning to all the provisions of these statutes precludes this, because there is a meaning, and a very clear and obvious one, which satisfies the words. Congress intended that maintenance charges should be collected, not as charges applicable only to former Indian lands, but as charges, like the charges for

"construction," accruing generally under the reclamation law, and applicable generally to all the lands of the projects, of which the Indian lands were merely to become a part. If such charges were not previously assessable under the reclamation act, these statutes made them so by enlarging it.

The case of *Postmaster General* v. *Early* (12 Wheat., 135), is clearly apposite. An act of Congress, entitled "An act to vest more effectually in the State courts and in the district courts of the United States jurisdiction in the cases therein mentioned," declared that the district courts should have jurisdiction of certain cases "concurrent with * * * the circuit courts." The case presented to this court by writ of error was of the kind specified in the act but had been brought in the Circuit Court, which had no jurisdiction, unless jurisdiction was conferred by the words quoted. This court held that the provision that the District Courts should have jurisdiction "concurrent with" the Circuit Courts operated to invest the latter with jurisdiction also. Chief Justice Marshall in the opinion declared that these words were not senseless, but had a plain and obvious meaning which could not be disregarded in construing the statute, and said (p. 148):

> We can not understand this clause, as if these words were excluded from it. They, perhaps, manifest the opinion of the legislature, that the jurisdiction was in the circuit courts; but ought, we think, to be construed to give it, if it did not previously exist. Any

other construction would destroy the effect of those words. The district court can not take cognizance, concurrent with the circuit courts, unless the circuit courts can take cognizance of the same suits. For one body to do a thing concurrently with another, is to act in conjunction with that other; it is equivalent to saying, the one may act together with the other. The phrase may imply, that power was previously given to that other; but if, in fact, it had not been given, the words are capable of imparting it. If they are susceptible of this construction, they ought to receive it, because they will otherwise be totally inoperative, or will contradict the other parts of the sentence, which show plainly the intention, that the district court shall have cognizance of the subject, and shall take it to the same extent with the circuit courts.

* * * It is true, that the language of the section indicates the opinion, that jurisdiction existed in the circuit courts, rather than an intention to give it; and a mistaken opinion of the legislature concerning the law, does not make law. But if this mistake be manifested in words competent to make the law in future, we know of no principle which can deny them this effect. The legislature may pass a declaratory act, which, though inoperative on the past, may act in future. This law expresses the sense of the legislature on the existing law, as plainly as a declaratory act, and expresses it in terms capable of conferring the jurisdiction.

See also *Ohio* v. *Thomas*, 173 U. S. 276, 282.

Examination of the acts of June 25, 1910, and August 9, 1912, *supra*, will demonstrate that they also would be effective to require the collection of charges even if all the prior legislation had omitted to do so; but as we do not feel justified, under the circumstances, in extending our inquiry to the question whether Congress might constitutionally add new charges upon the water users after their applications have been definitely made and approved, we are quite content, so far as the present point is concerned, to rest upon the earlier legislation which preceded the plaintiff's application. It should be observed, however, that the plaintiff in his application expressly agreed to pay the charges for maintenance and operation in accordance with the regulations of the Secretary of the Interior.

CONCLUSION.

Finally, it may not improperly be suggested that the plaintiff's case presents no strong element of appeal to the conscience of a court of chancery. He acquired his land, (whether directly from the Government or through some other owner does not appear,) without reference to the "project," before it was undertaken. Nothing compelled him to become an applicant, but he did so, and agreed to pay the charges and abide by the regulations. By this suit he seeks to repudiate his application in part and to enforce for himself a gratuity which, while it would mean little to him, can not be conceded without most serious consequences to the public. No

reason appears why the public moneys should thus be gratuitously expended, in enormous sums, for the special benefit of private individuals. And yet, if the plaintiff should succeed, the Government will be compelled to forego the collection of millions of dollars which have been expended, will rest under a moral, if not a legal, obligation to refund hundreds of thousands more to those who have already paid; must revise its plans of reclamation, delay their execution, and possibly abandon the reclamation policy itself before its full purposes shall have been achieved.

Respectfully submitted.

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APPENDIX.

Reclamation Act.

An Act Appropriating the receipts from the sale and disposal of public lands in certain States and Territories to the construction of irrigation works for the reclamation of arid lands.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That all moneys received from the sale and disposal of public lands in Arizona, California, Colorado, Idaho, Kansas, Montana, Nebraska, Nevada, New Mexico, North Dakota, Oklahoma, Oregon, South Dakota, Utah, Washington, and Wyoming, beginning with the fiscal year ending June thirtieth, nineteen hundred and one, including the surplus of fees and commissions in excess of allowances to registers and receivers, and excepting the five per centum of the proceeds of the sales of public lands in the above States set aside by law for educational and other purposes, shall be, and the same are hereby, reserved, set aside, and appropriated as a special fund in the Treasury to be known as the "reclamation fund," to be used in the examination and survey for and the construction and maintenance of irrigation works for the storage, diversion, and development of waters for the reclamation of arid and semiarid lands in the said States and Territories, and for the payment of all other expenditures provided for in this Act: *Provided*, That in case the receipts from the sale and disposal of public lands other than those realized from the sale and disposal of lands referred to in this section are insufficient to meet the requirements for the support of agricultural colleges in the several States and Territories, under the act of August thirtieth, eighteen hundred and ninety, entitled "An act to apply a portion of the proceeds of the public lands to the more complete endowment and support of the colleges for the benefit of agriculture and the mechanic arts, established under the provisions of

an act of Congress approved July second, eighteen hundred and sixty-two," the deficiency, if any, in the sum necessary for the support of the said colleges shall be provided for from any moneys in the Treasury not otherwise appropriated.

SEC. 2. That the Secretary of the Interior is hereby authorized and directed to make examinations and surveys for, and to locate and construct, as herein provided, irrigation works for the storage, diversion, and development of waters, including artesian wells, and to report to Congress at the beginning of each regular session as to the results of such examinations and surveys, giving estimates of cost of all contemplated works, the quantity and location of the lands which can be irrigated therefrom, and all facts relative to the practicability of each irrigation project; also the cost of works in process of construction, as well as of those which have been completed.

SEC. 3. That the Secretary of the Interior shall, before giving the public notice provided for in section four of this act, withdraw from public entry the lands required for any irrigation works contemplated under the provisions of this act, and shall restore to public entry any of the lands so withdrawn when, in his judgment, such lands are not required for the purposes of this act; and the Secretary of the Interior is hereby authorized, at or immediately prior to the time of beginning the surveys for any contemplated irrigation works, to withdraw from entry, except under the homestead laws, any public lands believed to be susceptible of irrigation from said works: *Provided*, That all lands entered and entries made under the homestead laws within areas so withdrawn during such withdrawal shall be subject to all the provisions, limitations, charges, terms, and conditions of this act; that said surveys shall be prosecuted diligently to completion, and upon the completion thereof, and of the necessary maps, plans, and estimates of cost, the Secretary of the Interior shall determine whether or not said project is practicable and advisable, and if determined to be impracticable or unadvisable he shall thereupon restore said lands to entry; that public lands which it is proposed to irrigate by means of any contemplated works shall be subject to entry only under the provisions of the homestead laws in tracts of not less than forty nor more than one hundred and sixty acres,

and shall be subject to the limitations, charges, terms, and conditions herein provided: *Provided*, That the commutation provisions of the homestead laws shall not apply to entries made under this act.

SEC. 4. That upon the determination by the Secretary of the Interior that any irrigation project is practicable, he may cause to be let contracts for the construction of the same, in such portions or sections as it may be practicable to construct and complete as parts of the whole project, providing the necessary funds for such portions or sections are available in the reclamation fund, and thereupon he shall give public notice of the lands irrigable under such project and limit of area per entry, which limit shall represent the acreage which, in the opinion of the Secretary, may be reasonably required for the support of a family upon the lands in question; also of the charges which shall be made per acre upon the said entries, and upon lands in private ownership which may be irrigated by the waters of the said irrigation project, and the number of annual installments, not exceeding ten, in which such charges shall be paid and the time when such payments shall commence. The said charges shall be determined with a view of returning to the reclamation fund the estimated cost of construction of the project, and shall be apportioned equitably: *Provided*, That in all construction work eight hours shall constitute a day's work, and no Mongolian labor shall be employed thereon.

SEC. 5. That the entryman upon lands to be irrigated by such works shall, in addition to compliance with the homestead laws, reclaim at least one-half of the total irrigable area of his entry for agricultural purposes, and before receiving patent for the lands covered by his entry shall pay to the Government the charges apportioned against such tract, as provided in section four. No right to the use of water for land in private ownership shall be sold for a tract exceeding one hundred and sixty acres to any one landowner, and no such sale shall be made to any landowner unless he be an actual bona fide resident on such land, or occupant thereof residing in the neighborhood of said land, and no such right shall permanently attach until all payments therefor are made. The annual installments shall be paid to the receiver

of the local land office of the district in which the land is situated, and a failure to make any two payments when due shall render the entry subject to cancellation, with the forfeiture of all rights under this act, as well as of any moneys already paid thereon. All moneys received from the above sources shall be paid into the reclamation fund. Registers and receivers shall be allowed the usual commissions on all moneys paid for lands entered under this act.

SEC. 6. That the Secretary of the Interior is hereby authorized and directed to use the reclamation fund for the operation and maintenance of all reservoirs and irrigation works constructed under the provision of this act: *Provided*, That when the payments required by this act are made for the major portion of the lands irrigated from the waters of any of the works herein provided for, then the management and operation of such irrigation works shall pass to the owners of the lands irrigated thereby, to be maintained at their expense under such form of organization and under such rules and regulations as may be acceptable to the Secretary of the Interior: *Provided*, That the title to and the management and operation of the reservoirs and the works necessary for their protection and operation shall remain in the Government until otherwise provided by Congress.

SEC. 7. That where in carrying out the provisions of this act it becomes necessary to acquire any rights or property, the Secretary of the Interior is hereby authorized to acquire the same for the United States by purchase or by condemnation under judicial process, and to pay from the reclamation fund the sums which may be needed for that purpose, and it shall be the duty of the Attorney General of the United States upon every application of the Secretary of the Interior, under this act, to cause proceedings to be commenced for condemnation within thirty days from the receipt of the application at the Department of Justice.

SEC. 8. That nothing in this act shall be construed as affecting or intended to affect or to in any way interfere with the laws of any State or Territory relating to the control, appropriation, use, or distribution of water used in irrigation, or any vested right acquired thereunder, and the Secretary of the Interior, in carrying out the provisions of this act, shall proceed in conformity with such laws, and nothing

herein shall in any way affect any right of any State or of the Federal Government or of any landowner, appropriator, or user of water in, to, or from any interstate stream or the waters thereof: *Provided*, That the right to the use of water acquired under the provisions of this act shall be appurtenant to the land irrigated, and beneficial use shall be the basis, the measure, and the limit of the right.

SEC. 9. That it is hereby declared to be the duty of the Secretary of the Interior in carrying out the provisions of this act, so far as the same may be practicable and subject to the existence of feasible irrigation projects, to expend the major portion of the funds arising from the sale of public lands within each State and Territory hereinbefore named for the benefit of arid and semiarid lands within the limits of such State or Territory: *Provided*, That the Secretary may temporarily use such portion of said funds for the benefit of arid or semiarid lands in any particular State or Territory hereinbefore named as he may deem advisable, but when so used the excess shall be restored to the fund as soon as practicable, to the end that ultimately, and in any event, within each ten-year period after the passage of this act, the expenditures for the benefit of the said States and Territories shall be equalized according to the proportions and subject to the conditions as to practicability and feasibility aforesaid.

SEC. 10. That the Secretary of the Interior is hereby authorized to perform any and all acts and to make such rules and regulations as may be necessary and proper for the purpose of carrying the provisions of this act into full force and effect. [32 Stat. L., 388.]

Approved, June 17, 1902.

EXTRACTS FROM REPORTS OF COMMITTEES AND ORAL EXPLANATIONS OF COMMITTEE MEMBERS MADE TO THE HOUSES OF CONGRESS.

The report of the bill to the Senate, of the Committee on Public Lands, dated January 28, 1902 (No. 254, 57th Cong., 1st sess.), contains the following:

The bill appropriates the proceeds from the sales of public lands, amounting on the average for the past two years to

nearly $3,000,000 annually, and creates a reclamation fund, from which fund the Secretary of the Interior is authorized to make payment for necessary examinations and surveys and to construct irrigation works for the reclamation of the arid and semiarid lands in the States and Territories named in the bill. The cost of such works is to be assessed against the lands benefited and collections made in 10 annual installments, the moneys thus paid going into the reclamation fund. By this method the fund will constantly be replenished, making irrigation practically a self-sustaining enterprise and, according to estimates by the Geological Survey, ultimately putting money into the Treasury.

It also provided that the cost of operation and maintenance of reservoirs and irrigation works shall be paid from the irrigation fund, but when payments are made on the major portion of the lands irrigated under any project the management and operation of all works, except reservoirs and the works necessary for their operation and protection, shall pass to the owners of the land, to be maintained at their expense under rules prescribed by the Secretary.

* * * * *

In addition to compliance with the homestead laws, which in part are made applicable to the lands affected by the provisions of this bill, the entryman shall reclaim such lands for agricultural purposes and shall pay all charges before receiving patent.

* * * * *

Senator Hansbrough, a member of the committee, in explaining the bill to the Senate on February 6, 1902, said, among other things:

The advocates of a national irrigation policy submit a plan whereby large areas of land, now practically worthless, may be opened, not at Government expense, but at a cost to be assessed against the land. * * * (35th Cong. Rec., 1383).

It should be understood at the outset that the plan proposed by this bill does not require a great outlay of money; that it does not contemplate a "raid upon the Treasury," as is apprehended by some gentlemen who have given the question only a superficial examination. Neither is there the

slightest probability of an overproduction of small grains as a result of the successful operation of the project.

First. The cost is limited to the proceeds from the sale and disposal of public lands in the 13 States and 3 Territories named in the bill. This would involve a sum aggregating, perhaps, $2,500,000 per annum, according to official reports on the present income from this source. It is provided in the bill that the cost of construction of each irrigation project shall be paid by the persons directly benefited. Thus the money expended would constantly be recouped or repaid to the reclamation fund, making the system automatic and self-sustaining. (Ib., 1384.)

Senator Patterson said:

I believe, Mr. President, that the proposed law is so framed as that the fund that it produces will be a constantly accumulating fund. It is altogether improbable in my mind that those who live in the arid country will in later years be coming to Congress and asking for more appropriations for the reclamation of these lands. Under the operations of the bill, if it is honestly and fairly administered, I believe that when the last acre is reclaimed there will be more money in the fund than there will be at any time during the first five years of its operation. * * * (Ib. 2284.)

Mr. President, no project ought to be undertaken until it is considered and until they have determined to proceed with it to its completion as promptly as it is possible in the nature of the work for that to be done. When the structure is completed under the bill it is to be turned over to the regulation of the laws of the State in which the work is located. The people who get the benefit of it pay for the advantage which they receive by turning into this reclamation fund the amount of the expenditure necessary for its completion. When that is done the account is balanced up between the Government and the individuals who receive the benefit of this beneficent expenditure. (Ib. 2285.)

The report of the Committee on Irrigation of Arid Lands, which had this bill in charge, to the House of Representatives (dated Apr. 7, 1902; No. 1468,

57th Cong., 1st sess.) is quite lengthy, but the following matter appears to be all that is directly pertinent to the present inquiry:

The Secretary of the Interior is directed to apportion all charges equitably, with a view of returning to the reclamation fund cost of construction of the project. * * *

Section 6 authorizes the Secretary to use the reclamation fund for the operation and maintenance of the works constructed under the provisions of the act, but provides that when the payments are made for a major portion of the lands irrigated then the management and operation of the works shall pass to the owners of the land irrigated, to be maintained at their expense, under such rules and regulations as may be provided by the Secretary of the Interior. The ownership and operation of all reservoirs, however, remain in the hands of the Government until otherwise provided by Congress.

* * * * *

The Government is free from all expense or responsibility when projects are completed and paid for. * * *

While the bill will, it is confidently expected, furnish a sufficient sum to construct the larger irrigation works required in the arid region, it is not expected or contemplated that the works constructed by the Government will include anything but reservoirs and the main canals, leaving, even under the systems constructed by the Government, all of those diversion and distribution works which may be constructed by individual or cooperative effort, to be so constructed. Further, the bill is intended to supplement rather than usurp the domain of private and cooperative enterprise. The payment by the settler of the cost of reclamation eliminates all danger of ruinous competition with the smaller and less complicated works which may be so undertaken, and there can be no doubt that such development will be stimulated by the work carried on by the Government and the greater proportion of irrigation reclamation be undertaken and accomplished by private enterprise. * * *

The opponents of this measure have claimed that it would lead to a vast expenditure by the General Government, and

the most exaggerated statements have been made as to probable aggregate outlay. It should be borne in mind that it is not proposed to take a penny for the work contemplated out of the public Treasury. Provision is made whereby the arid region shall reclaim itself by utilizing the sale of public lands there for that purpose. By no possibility can the expenditures under the bill exceed the proceeds of the sales of the public lands in the region affected by the bill, and this is by no means a direct expenditure, but is rather in the nature of a loan, inasmuch as the settler is to pay to the Government the cost of the reclamation of his land, and in this way the money paid out for the construction of works is returned to the Treasury; therefore all of the extravagant estimates which have been made by the critics of the measure as to the cost to the Government under its operations have been erroneous and misleading. It is true that if the bill becomes a law and works satisfactorily, in the course of time a large sum of money will be spent by the Government in the construction of irrigation works, but under the provisions of the bill all of these sums are to be repaid, so that the reclamation fund, instead of decreasing, will constantly increase. The only actual expenditure under the bill not reimbursable would be certain items of administration, surveys, and examinations of projects, the construction of which, for one reason or another, might not be undertaken.

A half a million dollars a year would be a high estimate for this class of expenditure after the system was fairly inaugurated and would undoubtedly be considerably less for some years, and the actual cost to the Government, then, under the provisions of the bill, at a liberal estimate, would be about what it costs to run the Library of Congress, all other expenditures than those referred to being reimbursable, and therefore merely a loan.

It is true that the argument is made that while the bill provides for the repayment to the Government of the cost of construction of irrigation works, if the bill were passed members of Congress from the districts and States interested would soon be clamoring for the relief of their constituents from these payments. This argument is founded on a misunderstanding of the conditions. It should be remem-

bered that the lands which will be irrigated under Government works will be in the vicinity of large areas of land irrigated by private, cooperative, and corporate enterprise. Those interested in and dwelling upon the lands so irrigated would earnestly protest against the settlers in their own regions and vicinity living under the Government works being relieved from their payments, as that would have a tendency to lower the value of all irrigated lands in the region and work a hardship on them. Further than that, those in one part of the arid region who were waiting for the development of irrigation in their vicinity and who could only hope for such development by the replenishment of the fund, would object seriously to any legislation which would relieve anyone from payments under the bill, as such relief would delay the inauguration of works in their vicinity.

Briefly, then, the entire outlay by the Federal Government is limited to the proceeds of the sales of public lands in the region benefited; all of this amount is reimbursable under the terms of the bill except a limited expense for administration, surveys, and examinations, and there is very little probability of there being any effort made to modify the feature of the measure providing for reimbursement to the Government of the money expended in the construction of irrigation works, because such modification would be detrimental to the interests of the people most interested in the measure.

If the bill works satisfactorily, as those who have given the subject most careful study believe it will, a large fund will be established, which, in the course of time, could be used for other purposes.

It is confidently hoped that the measure will produce a fund amounting at the beginning to from $2,000,000 to $2,500,000 per annum, which will gradually increase by the sales of land under the various projects undertaken, and that this fund will be sufficient to construct such works and carry on such enterprises as are necessary to be undertaken by the Government to insure a reasonable, systematic, and harmonious development of the irrigation possibilities of the arid region.

Estimating the fund at $2,500,000 per annum, which is probably high, and the expense necessary to be incurred by

the Government in order to bring water within reach of the settler at $10 per acre, the fund would, up to the time it was augmented by sales of irrigated lands, be sufficient to make possible the irrigation of 250,000 acres of land per annum. Any considerable increase over this amount must come from the use of the moneys received from the sales of irrigated lands; therefore the entire arid region would be interested in having these moneys promptly and fully paid.

The following excerpts are taken from the explanations made to the House by various members of the committee. The citations are to the thirty-fifth volume of the Congressional Record.

Mr. Mondell (who had the bill in charge):

Another serious obstacle to the undertaking of the larger and more intricate irrigation works by private enterprise lies in the fact that private enterprise must always look for a profit on its investment, and where an irrigation enterprise requires a considerable number of years for its complete development, interest charges become a very serious item; while the Government, interested only in the settlement of the lands, can well forego any interest on investments and be content with the return of the principal. Private enterprise, to be successful and command capital, must pay interest on the investment from the start, and thus many an enterprise which might ultimately have proven successful has been a disappointing failure because the first few years after its inauguration it failed to yield returns. * * * (Ib., 6676.)

Section 4 provides for the construction of the works and for the apportioning of the cost of construction among the users of water upon the lands to be irrigated. * * * (Ib., 6678.)

It having been ascertained that a sufficient supply of water for the irrigation of the lands in question was available and unappropriated and the feasibility of a project having been determined, the Secretary of the Interior would proceed to make the appropriation of the necessary water by giving the notice and complying with the forms of law of the State or Territory in which the works were located. He

would then estimate the cost of the proposed works, and having determined upon their construction would advertise for bids for same, and would thereupon give notice of the limit of area per entry under the particular project, which limit under the provisions of the act would "represent the acreage which, in the opinion of the Secretary, may be reasonably required for the support of a family upon the lands in question. At the same time notice would be given of the charges to be made per acre upon each entry and upon lands in private ownership which might be irrigated by the waters of the works in question, which charges are to be determined with a view of returning to the reclamation fund the cost of construction, and be apportioned equitably." * * * (Ib., 6678.)

As to the public lands, the entryman must not only reside upon his claim five years, but he must also irrigate at least half of it and make all the payments required before securing a patent to the same and a water right for its irrigation. * * * (Ib., p. 6678.)

Following the usual custom in the arid region, it is provided that when payments are made on a major portion of the lands to be irrigated from any project the management of and maintenance thereof, at their own expense, shall pass to the owners of the land irrigated under such rules and regulations as the Secretary of the Interior may prescribe, and at this time the Government is relieved from all further expense in the maintenance of the distributing works. * * * (Ib., p. 6679.)

This is not a proposition to use the public revenues for the work of developing the arid region. If it were, and in the form of a loan, reimbursable as under the provisions of the bill, I can not understand how it would be any more subject to the objection of being unconstitutional than was Government aid in the building of the transcontinental railways; but there is no necessity of discussing that point, for this is a proposition only to use the proceeds of the sales of certain public lands for the purpose of making other lands salable. * * * (Ib., p. 6680.)

The opponents of this measure have claimed that it would lead to a vast expenditure by the General Government, and the most exaggerated statements have been made as to

probable aggregate outlay. It should be borne in mind that it is not proposed to take a penny for the work contemplated out of the public Treasury. Provision is made whereby the arid region shall reclaim itself by utilizing the sale of public lands there for that purpose. By no possibility can the expenditures under the bill exceed the proceeds of the sales of the public lands in the region affected by it, and this is not a direct expenditure, but is rather in the nature of a loan, inasmuch as the settler is to pay to the Government the cost of the reclamation of his land, and in this way the money paid out for the construction of the works is returned to the Treasury. It is true that if the bill becomes a law and works satisfactorily in the course of time a large sum of money will be spent by the Government in the construction of irrigation works; but under the provisions of the bill these sums are to be repaid, so that the reclamation fund, instead of decreasing, will constantly increase. The only actual expenditure under the bill not reimbursable would be certain items of administration, surveys, and examinations of projects the construction of which for one reason or another might not be undertaken.

It is true that the argument is made that while the bill provides for the repayment to the Government of the cost of construction of irrigation works, if the bill were passed members of Congress from the districts and States interested would soon be clamoring for the relief of their constituents from these payments. This argument is founded on a misunderstanding of the conditions in the arid region. It should be remembered that the lands which will be irrigated under Government works will be in the vicinity of large areas of land irrigated by private, cooperative, and corporate enterprise. Those interested in and dwelling upon the lands so irrigated would earnestly protest against the settlers in their own regions and vicinity living under the Government works being relieved from their payments, as that would have a tendency to lower the value of all irrigated lands in the region and work a hardship on them. Further than that, those in one part of the arid region, who were waiting for the development of irrigation in their vicinity and who could only hope for such development by the replenishment of the

fund, would object seriously to any legislation which would relieve any one from payments under the bill and thereby delay the inauguration of works in their vicinity. * * * (Ib., p. 6681.)

The plan presented for the prosecution of the work proposed is a simple one. It imposes no dollar of taxation upon any American citizen, recognizes the dual character of our Government, and, inviting no conflict of authority, provides a business-like method for the accomplishment of great undertakings and maintains the American principle of small farms under water rights ample and secure. (Ib., p. 6682.)

Mr. Underwood said:

It is proposed by the present bill to take the proceeds of the sale of the lands in these arid States, amounting to something between a million and a million and a half a year, and turn them over to the Secretary of the Interior, as a trust fund with which to build great dams to hold the surplus waters that come down the Western rivers in the spring, and build canals carrying the waters from these dams across to the lands to be irrigated. The small ditches from the canals to the farms are expected to be built by the owners of the land. The proposition is that the lands shall be sold for homesteads at the actual cost of building the dams and canals, the money raised to go back into the trust fund for further development of other lands and the opening of new country to settlement. It is therefore seen that it is not proposed to take any money from the Treasury that is derived from the people by taxation, but merely to grant to them the proceeds of the sale of their own lands in their own States to work out their own development. * * * (Ib., p. 6672.) After they are completed the cost of the construction shall be divided among the acres of land that can be irrigated from these works, and before anyone can acquire title from the United States to the reclaimed land he must pay into the Treasury of the United States every dollar of the cost of the construction of those works. Talk to me about that being an extravagant measure! Say to me that that is not a conservative measure! Mr. Speaker, it seems to me if any measure on earth could be indorsed, if we are going to develop that Western country in any

manner, this is the bill which should meet the approval of every man in this House. (Ib., 6673.)

Are you going to retain your own citizens here or are you going to prefer the development of Canada to the development of your own country, especially when the development of your own country does not take one dollar out of the Treasury of the United States? (Ib., 6673.)

If the gentleman will allow me, my information is that there is a very small portion of these lands that is open to homestead settlement. There is a large proportion of them that can be used for stock herding and stock raising, but those lands are usually used without being acquired from the Government. They are used by trespassers, and the only lands that the stock owners buy are the lands along the stream. That covers the water front, and then they go on pasturing their herds on the public lands, so in the present condition of those lands very little money will ever be derived from the sale of them for school purposes, or any other purpose; but if this bill works out, and you go on and build these reservoirs, and you sell the lands that are adjacent to the reservoirs, and the money comes back into the fund, ultimately, if the scheme works out and is correct, you will have finished all the reservoirs and you will have your fund left that can be used for school purposes, and the only way you will get a fund out of these arid lands for the carrying on of the appropriations for these schools is in that way. (Ib., 6737.)

Mr. Ray said:

You may go and take a piece of desert land free. When you have taken your land, if you desire to have irrigation, to have water, then you are to pay over to the Government such a sum of money as the Secretary of the Interior fixes as a proper compensation for the water right.

Mr. SHAFROTH. It says his "proportion of the total cost of construction;" that is the language of the bill.

Mr. RAY. He pays for this in the beginning. The public lands belong to all the people of the United States, the people in all the States, and you propose to take this money, in the first instance, that belongs to all the people, for the construction of these dams and these reservoirs in order

that you may build up and render irrigable and productive these lands in certain States and Territories. Now, whatever comes back from the men who take up these lands is not, under this bill, to come back into the Public Treasury and to be used for the benefit of all the people, but that money is to be used in the repair of existing and in the construction and extension of other irrigation works; and it is conceded, I may say, in the Committee on Irrigation, and conceded everywhere, that the public Treasury never will get back the cost of construction.

It is conceded that the money never can come back, because the cost of maintenance or the cost of the extension and repairs will use all. Except, some gentlemen claim, that way in the far distant future, when the present generation and its decendants, their great grandchildren, and their great-great-great-grandchildren are all gone, there is a possibility that from the revenues of these water rights, revenues derived from the reservoirs, there may be a surplus that will go back into the Public Treasury. But that is so far in the future, such a dim vision, that no one pretends to specify the time within a thousand years when a benefit could accrue to the people of the United States.

Now, there is your scheme in the beginning. My first objection to it is that it is unfair; that it is taking the money of all the people to build up one section of this great country; and that it is wrong in principle, sectional, and unwise. (Ib., 6683.)

Mr. Reeder said:

The idea that the charges upon the land for the construction of the irrigation works will be finally remitted by the Government is another wrong conception. The settlers on these lands will be getting water from the Government works each year, and during the time they will be paying for their water rights they will much prefer that the Government should continue in charge of the system. And, more than this, the whole sentiment of the West will oppose any diminution of the fund, because the general development of that great country will be speeded by maintaining the fund intact and getting it back for reinvestment from each system of works that is built. (Ib., 6740.)

Mr. Sutherland said:

As proposed by the bill under consideration, however, there should be on the part of any reasonable person no objection to this. This bill does not propose to take a single dollar from the Treasury. It does not impose a dollar of taxation upon a single citizen. It simply devotes these at present valueless and barren lands to their own redemption. I shall not take up the time of the House to enter upon a discussion of the details of the bill. I shall content myself with making a brief reply to some of the objections which have been urged against it. These objections in the main are to be found embodied in the minority report made by the gentleman from New York (Mr. Ray) and in his speech of yesterday. (Ib., 6769.)

Debate by other members will be found as follows: Shafroth, ib., 6683, 6772; Snook, ib., 6746; Jones, ib., 6753; Martin, ib., 6758; Ransdell, ib., 6766.

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In the Supreme Court of the United States.

OCTOBER TERM, 1912.

CHARLES H. SWIGART, E. McCULLOH, AND R. K. TIFFANY, appellants,
v.
D. P. BAKER, APPELLEE.
No. 944.

APPEAL FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

SUPPLEMENTARY BRIEF FOR APPELLANTS UPON THE FINALITY OF THE DECREE.

This brief, filed pursuant to permission obtained at the argument, is devoted exclusively to the question whether the decree of the Court of Appeals is final.

The decree reverses the decree of the District Court and remands the cause "for further proceedings in accordance with the views expressed in the opinion of this court." (R. 56.)

Our argument, condensed, is (1) That it is the substance, and not the mere verbal form, of the decree that must determine its finality; that, in ascertaining the substance, it is proper and necessary to consider both the state of the record and the opinion of the appellate court, in order to gather what was decided and the effect of the decision upon the future

of the cause; that if the effect, thus revealed, is necessarily to determine the whole merits of the controversy and leave nothing for the District Court to do but to execute the decree in a ministerial way, the decree is final, and (2) that such is the effect of the decree which this court now has before it.

I.

In cases coming from *State* tribunals this court appears to have adopted the strict rule that the finality of a judgment sought to be reviewed must be evident on the face of the judgment itself. That rule, however, results from the embarrassment and inconsistency involved in the examination and adjudication by this court of questions of *State law* in the process of determining its own jurisdiction.

> The confusion and contradiction which inevitably arose from resorting to the State law for the purpose of converting a judgment not on its face final into one final in character was the dominating reason leading to the establishment of the principle that the form of the judgment was controlling for the purpose of ascertaining its finality.

Louisiana Nav. Co. v. *Oyster Commission*, 226 U. S., 99, 101; *Norfolk Turnpike Co.* v. *Virginia*, 225 U. S., 264, 268.

The rule is, manifestly, inapplicable to the decrees of the lower Federal courts.

The fact that a decree of a Circuit Court of Appeals is a decree of reversal is, of course, no proof

against its finality, provided it disposes of the case upon its merits and leaves nothing for the court below but to execute the mandate.

This was decided in *Merrill* v. *National Bank*, 173 U. S., 131, 134. In that case the Court of Appeals did not itself formulate the decree which was to be entered by the Circuit Court, but it did give specific directions as to what it should contain.

In *Chesapeake & Potomac Tel. Co.* v. *Manning*, 186 U. S., 238, this Court upheld its jurisdiction to review a decree of the Court of Appeals of the District of Columbia, which reversed a decree of the Supreme Court of the District and remanded the cause "for the entry of a decree granting the injunction in conformity with the opinion of this court." As, in its opinion, the Court of Appeals made a complete disposition of the controversy, and left nothing for the lower court to do by way of further adjudication, this court held that the decree was final. The case, like the *Merrill case, supra*, differed from the case at bar in that the court of original jurisdiction was expressly directed to enter a final decree of a specified character.

In *Shawnee Compress Co.* v. *Anderson*, 209 U. S., 423, 426, this court, without question, reviewed a judgment of the Supreme Court of the Territory of Oklahoma, which reversed the judgment of the court below with instructions to render judgment for the plaintiff "in accordance with the opinion of the Supreme Court, and the prayer of the amended petition."

In *Mower* v. *Fletcher*, 114 U. S., 127, this court refused to dismiss two writs of error to judgments of the Supreme Court of California, which reversed the judgments below with directions to the trial court in each case "to enter judgment upon the findings for the plaintiff as prayed for in his complaint." The Chief Justice said (p. 128):

> That judgment is final for the purposes of a writ of error to this court, which terminates the litigation between the parties on the merits of the case, so that, if there should be an affirmance here, the court below would have nothing to do but to execute the judgment it had already rendered. *Bostwick* v. *Brinkerhoff*, 106 U. S., 3, and the numerous cases there cited. The judgments in these cases are of that character. The litigation is ended, and the rights of the parties on the merits have been fully determined. Nothing remains to be done but to require the inferior court to perform the ministerial act of entering the judgments in that court which have been ordered. This is but carrying the judgment of the Supreme Court which has been rendered into execution. Nothing is left to the judicial discretion of the court below. The cases relied on in support of the motions to dismiss were all judgments or decrees of reversal, with leave for further proceedings in the inferior court. Such judgments are not final, because something yet remains to be done to complete the litigation.

In the *Mower case*, it will be observed, while there was a direction to enter final judgment, there was no attempt upon the part of the state supreme court to formulate the judgment itself or to give specific directions as to what it should be, beyond instructing the trial court to conform it to the prayer of the complaint.

In *O'Dowd* v. *Russell*, 14 Wall., 402, even this degree of specification was lacking. W and his sureties, being sued on his official bond, on account of his alleged failure to account for certain moneys, set up in defense his discharge in bankruptcy. This plea was sustained by the Georgia trial court, and judgment went in W's favor. From this judgment the plaintiff appealed to the state supreme court upon the ground that W, for certain reasons, was precluded from availing himself of the discharge. That court reversed the judgment, and this court (the cause having been brought up by writ of error), held that the judgment of reversal was final. This seems to be clearly a case in which the finality of the judgment resulted wholly from its substantial effect. Doubtless this court felt satisfied that the whole merits of the case were so wrapped up in the controversy over the discharge that there was nothing further to litigate, through amendment or otherwise, when that issue was determined. There was, however, no extended discussion in the opinion.

In *Metropolitan Water Co.* v. *Kaw Valley District*, 223 U. S., 519, this court had occasion to consider the effect of a decree rendered by the Circuit Court

of Appeals upon appeal from an interlocutory decree of injunction granted by the Circuit Court, restraining the prosecution of certain condemnation proceedings, which the plaintiff was seeking to remove to the Circuit Court from a State tribunal before which they were pending. The injunction suit was ancillary to the effort to remove, and jurisdiction depended on the right of removal. The Court of Appeals, in its opinion, held that the proceedings were not removable and issued its mandate directing that the cause be reversed and remanded to the Circuit Court "with directions for proceeding in accordance with the opinion of this court." Upon return of the mandate, the Circuit Court sustained a demurrer, dismissed the bill, and certified to this court that the bill was dismissed solely because of the want of jurisdiction. In dismissing an appeal thereupon prosecuted directly from the final decree of the Circuit Court, this court held that the action of that court in entering it, being obedient to the command of the Court of Appeals, could not be reversed as erroneous, and, furthermore, that the decree of the Court of Appeals might have been brought to this court by certiorari, even though that mode of review should be held applicable to final decrees alone, since the decree of the Court of Appeals was to be deemed a final decree for the purpose of review in this court. We quote the following from the opinion, pp. 523, 524:

> We need not consider when a writ of certiorari may issue to review decisions on interlocutory orders by the Circuit Court of Appeals, for, in any event, its judgment in the

present case must be treated as *equivalent to a direction to enter a final decree* against the complainant for want of jurisdiction. It is true that the mandate did not in terms make such an order, yet its direction that the Circuit Court "should proceed in accordance with the opinion" operated to make the opinion a part of the mandate as completely as though it had been set out at length. Under such a mandate nothing was left for the Circuit Court to do except to dismiss the bill. * * *

It follows, therefore, that the Circuit Court of Appeals had authority to make a ruling which finally disposed of the case; that the complainant then had the right to ask it to certify the question of jurisdiction, and if that was refused, might have applied to this court for a writ of certiorari. Having failed successfully to prosecute these remedies, the judgment of the Circuit Court of Appeals remained conclusive upon the parties and binding upon the Circuit Court and every other court to which the case could by any possibility be taken.

The great significance of this ruling as applied to the present case is at once apparent. It was essential that the court should determine whether the decree of the Court of Appeals would have been reviewable by certiorari, because it had been previously laid down in other decisions (*Brown* v. *Alton Water Co.*, 222 U. S., 325, 333; *Robinson* v. *Caldwell*, 165 U. S., 359) that in one way or the other—either by certiorari or by appeal or writ of error—every judgment or decree which the statute of 1891 contem-

plated should be reviewed by this court could be brought here for review—and this particularly of questions involving the jurisdiction of the Circuit Courts. Obedience to this settled doctrine required some method for the review of the question which this court was asked to consider. The method was declared to be certiorari; and the court, not desiring to determine whether that process would run to interlocutory decrees, examined the decree of the Court of Appeals and decided that it was final. This means that if the original jurisdiction had been based, not on diversity of citizenship, but (as in the case at bar) upon the existence of a federal question, the decree of the Court of Appeals would have been deemed appealable immediately to this court.

We submit that this authority—a late expression of this court evidently given after most careful consideration—is determinative of the matter now under discussion, unless it can be said that, in our case, the appellate decision fell short of deciding the whole merits of the controversy.

II.

The effect of the mandate was to compel the District Court to enter a final decree of injunction as prayed for in the bill of complaint.

(*a*) The case was heard and submitted in the District Court on bill and answer. This was a submission of the whole case for a final decree in favor of one side or the other.

A demurrer to the answer is unknown in equity practice. But the plaintiff may set

down the case for hearing upon bill and answer; whereupon all the facts alleged in the bill and not denied in the answer, as well as all new facts alleged in the answer, are deemed admitted, as upon a demurrer to an answer in an action at law. (Equity Rule 41, as amended at December term, 1871, 13 Wall xi; Equity Rule 60; *Leeds* v. *Marine Ins. Co.*, 2 Wheat., 380; *Reynolds* v. *Crawfordsville Bank*, 112 U. S., 405, 409; *Banks* v. *Manchester*, 128 U. S., 244, 250, 251.)

For the purpose of the hearing upon exceptions to an answer, the facts alleged in the bill and in the answer must indeed be considered as admitted, and only matter of law is presented for decision, as in a case set down for hearing upon bill and answer. But the difference between the two cases is this: When a case in equity is set down for hearing on bill and answer, the whole case is presented for final decree in favor of either party. But when the matter set down for hearing is the plaintiff's exceptions to the answer the case is not ripe for a final decree; the only question to be decided is the sufficiency of the answer; and no final decree can be entered against either party, unless it declines or omits to plead further.

In re Sanford Fork & Tool Co., 160 U. S., 247, 257.

(*b*) The issue presented to the District Court went to the root of the plaintiff's cause of action. He alleged certain facts which, if conceded, would entitle him to the use of water for the irrigation of

the land in question, provided payment of the maintenance charge were not a lawful condition precedent. He prayed the only relief of which the cause, by its very nature, would admit: An injunction to restrain defendants from withholding water on account of the charge. The defendants, conceding the facts alleged, but asserting the legality of the charge as fixed by the Secretary of the Interior, in effect confessed their intention to refuse the water in future if the charge were not paid.

Upon this issue it would have been the duty of the District Court to decree an injunction as prayed if it found the law in favor of the plaintiff, just as it was its duty to dismiss the bill, as it actually did, upon finding the opposite.

It is true that there are other matters in the pleadings, which, if insisted on, might have availed to raise subsidiary issues of fact or of law, affecting the merits, other than the issue which was actually decided. But all such matters were waived by the parties and ignored by both courts.

> Effect must therefore be given to the well-settled rule that where the parties, with the assent of the court, unite in trying a case on the theory that a particular matter is within the issues, that theory can not be rejected when the case comes before an appellate court for review.
>
> *San Juan Light & Transit Co.* v. *Requena*, 224 U. S., 89, 97.
>
> (See, also, *Wasatch Min. Co.* v. *Crescent Min. Co.*, 148 U. S., 293, 299; *Fortier* v. *New Orleans*

Nat. Bank, 112 U. S., 439, 445; *Railroad Co.* v. *Estill*, 147 U. S., 591, 615; *Kansas & A. V. Ry. Co.* v. *Dye*, 70 Fed., 24, 26; *Baker* v. *Kaiser*, 126 Fed., 317; *Wines* v. *New York*, 70 N. Y., 613.)

(*c*) We have, then, a case presented and submitted for final determination upon a single issue of law going to the merits of the entire controversy, and a decree of the Court of Appeals definitely disposing of that issue.

> When a decree finally decides and disposes of the whole merits of the cause, and reserves no further questions or directions for the future judgment of the court, so that it will not be necessary to bring the cause again before the court for its final decision, it is a final decree. *Beebe* v. *Russell*, 19 How., 283, 285.

The only fields for the exercise of judicial power which may possibly be conceived of, as left open for the District Court, were (1) in determining the character and form of the decree, and (2) in allowing amendments of the pleadings and the introduction of new issues for the further litigation of the cause. These suggestions are easily disposed of.

(1) The only relief prayed and the only relief possible was an injunction. This was the unavoidable predicate of the thing adjudged, and could not have been denied without disobedience to the adjudication. Practically the case was the same as in *Mower* v. *Fletcher*, *supra*, where the judgment of the Supreme Court of California, under review, reversed the judgment below with directions to the trial court "to

enter judgment upon the findings for the plaintiff as prayed for in his complaint." This court said that by that judgment the litigation was ended and the rights of the parties on the merits fully determined. Nothing remained to be done but to require the inferior court to perform the ministerial act of entering the judgment directed. Nothing was left to its judicial discretion.

The lower court had no greater choice in this case than in that regarding the character of the decree to be entered. And certainly the discretion involved in suiting the form of the final decree to the general directions of the appellate court would be no different here from that which must be exercised in the numerous cases where final decrees are expressly ordered in general terms, or in accordance with views given in opinions.

(2) Doubtless the District Court, *had there been no appeal,* would have had a sound discretion to allow amendments to the pleadings, and the introduction thereby of new issues, consistent with the cause of action, prior to the entry of a final decree. Even *after* entry of a decree based upon pleadings and evidence, it might, *if there had been no appeal,* have permitted the case to be reopened, through the medium of a rehearing or a bill of review. But once a case has been adjudged, as this one was, upon its merits, by an appellate court, the discretion to do these things without the antecedent permission of that court no longer exists in the court below.

> When a case has been once decided by this court on appeal, and remanded to the Circuit Court, whatever was before this court and disposed of by its decree, is considered as finally settled. The Circuit Court is bound by the decree as the law of the case; and must carry it into execution, according to the mandate. That court can not vary it, or examine it for any other purpose than execution; or give any other or further relief; or review it, even for apparent error, upon any matter decided on appeal; or intermeddle with it, further than to settle so much as has been remanded.

In re Sanford Fork & Tool Co., 160 U. S., at p. 255.

Particular attention is invited to the case of *In re Potts*, 166 U. S., 263. The Circuit Court, at a hearing upon pleadings and proofs, in a suit for infringement of letters patent, in which the answer denied infringement and alleged want of novelty, had dismissed the bill upon the latter ground. This court, upon appeal, had held that the letters patent were valid and infringed, and had therefore reversed the decree and remanded the cause for further proceedings in conformity with its opinion. The Circuit Court then, obeying the mandate, entered a decree adjudging the patent valid and infringed, referring the cause to a master for an account of profits, and awarding a perpetual injunction; but later, upon petition of the defendant, it granted a rehearing for newly discovered evidence, and after hearing the new evidence, being of opinion

that in view of it the patent was void for want of invention, ordered that the petition stand as a supplemental answer and that the replication as filed be considered as a replication thereto. This court, in mandamus, held, that the Circuit Court was without authority to grant or entertain the petition, saying (p. 267):

> When the merits of a case have been once decided by this court on appeal, the Circuit Court has no authority, without express leave of this court, to grant a new trial, a rehearing, or a review or to permit new defenses on the merits to be introduced by amendment of the answer. (*Ex parte Story*, 12 Pet., 339; *Southard* v. *Russell*, 16 How., 547; *Ex parte Dubuque & Pacific Railroad*, 1 Wall., 69; *Stewart* v. *Salamon*, 97 U. S., 361; *Gaines* v. *Rugg*, 148 U. S., 228.) In this respect, a motion for a new trial or a petition for a rehearing stands upon the same ground as a bill of review, as to which Mr. Justice Nelson, speaking for this court, in *Southard* v. *Russell*, above cited, said: "Nor will a bill of review lie in the case of newly discovered evidence after the publication, or decree below, where a decision has taken place on an appeal, unless the right is reserved in the decree of the appellate court or permission be given on an application to that court, directly for the purpose. This appears to be the practice of the Court of Chancery and House of Lords in England; and we think it founded in principles essential to the proper administration of the law and to a

> reasonable termination of litigation between the parties in chancery suits." (16 How., 570, 571.) So, in *United States* v. *Knight* (1 Black, 488, 489) Chief Justice Taney said that, in a case brought before this court exercising general jurisdiction in chancery. "the defeated party, upon the discovery of new evidence, may, after a final decree in this court, obtain leave here to file a bill of review in the court below to review the judgment which this court had rendered."

In *Stewart* v. *Salamon*, 97 U. S., 361, after this court upon a first appeal (94 U. S., 434) had reversed the decree of the Circuit Court for further proceedings, instructing it through the opinion how to proceed in computing the principal and interest due on certain promissory notes which were the subject of the suit, the case was brought to the court again upon a second appeal based upon a decree of the Circuit Court overruling a petition for leave to file an amended answer and granting final relief in accordance with the mandate. This court upon motion dismissed the second appeal, saying (p. 362):

> This is an appeal from a decree entered upon our mandate. No complaint is made as to its form, and it seems to be in all respects according to our directions. The effort of the appellant was to open the case below and to obtain leave to file new pleadings, introducing new defenses. This he could not do. The rights of the parties in the subject matter of the suit were finally determined upon

> the original appeal, and all that remained for the Circuit Court to do was to enter a decree in accordance with our instructions and carry it into effect. If in the progress of the execution of the decree, after its entry, either party is aggrieved, he may appeal from the final decree in that behalf; but such an appeal will bring up for reexamination only the proceedings subsequent to the mandate.

(*d*) If the mandate had expressly directed the District Court to enter a decree as prayed for in the bill, or in accordance with the opinion, its finality could not be seriously doubted. Does the fact that such express directions were omitted seem material when it is certain that their place was taken by the law itself? This question is answered in the negative by the *Metropolitan Water Company's case, supra*, and we do not see how it could be answered otherwise without overturning that authority. It is true that there the decree of the Court of Appeals denied the jurisdiction of the court below, whereas here the jurisdiction is conceded. But this distinction is unimportant, since "the logical conclusion," though more patent, is found, upon reflection, to be no more inevitable in the one case than in the other.

CONCLUSION.

Before closing this discussion we should call attention to the case of *Earle* v. *Myers*, 207 U. S., 244, 251 (s. c. *Waggaman* v. *Earle*, 25 App. D. C., 582), which has come to our notice since the argument and seems difficult to reconcile with the *Metropolitan Water*

Company's case, *Merrill* v. *National Bank*, *The Chesapeake & Potomac Company's case*, *Mower* v. *Fletcher*, and other authorities which we have cited. The first of the two appeals was dismissed as from a decree not final. The opinion does not discuss the subject, neither, presumably, was it argued by the appellant, who was certain that if one appeal were not good the other must be. It is respectfully submitted that a sufficient reason for dismissing one of the appeals would have been that there can not be two by the same party in the same case at the same time. Tested by the authorities just cited, the first decree seems certainly appealable unless there was something in the record which the reports do not clearly reveal.

When a decree of the Court of Appeals disposes of a controversy in every substantial aspect, the hardship of requiring the defeated party (who does not wish to amend and could not do so if he wished) to take the case down and back again for the sake of complying with a mere formality of words is too patent for comment. Such a requirement would be out of keeping with the modern effort, in which this court is truly the guiding spirit, to rid our practice of useless technicalities and ruinous delays. Even where some speculative possibility of "further proceedings" in the way of amendment or what not may be found to exist, why should not the litigant thus theoretically favored be permitted to waive the barren theory in return for the practical advantage of an immediate review by this court?

I am authorized to say that the foregoing argument has the approval and concurrence of counsel for the appellee.

Respectfully submitted.

ERNEST KNAEBEL,
Assistant Attorney General.

APRIL, 1913.

○

In the Supreme Court of the United States

No. ....

CHARLES H. SWIGART, E. McCULLOH and R. K. TIFFANY,

Appellants,

vs.

D. P. BAKER,

Appellee.

BRIEF OF APPELLEE

It will be observed that this case presents but a single question. It is the contention of Government that the Interior Department is entitled to levy arbitrarily against water users under the "Reclamation Act" an assessment for an amount such as that Department deems proper for the operation and maintenance of the irrigation works, and to compel the water user to pay such sum so arbitrarily assessed under penalty of being deprived of water. It is our contention that Congress has by law unequivocally provided that these charges shall be paid by the

National Government out of the "Reclamation Fund," the same being a fund made up from the proceeds of sales of public lands in various states. Naturally enough the first reference should be to the act itself. For the sake of convenience, we print here the Act of June 17th, 1902, known as the "Reclamation Act," and we shall italicize those portions of the Act which have a particular relation to the present controversy.

> "Be it enacted by the Senate and House of Representatives of the United States of America, in Congress assembled, That all moneys received from the sale and disposal of public lands in Arizona, California, Colorado, Idaho, Kansas, Montana, Nebraska, Nevada, New Mexico, North Dakota, Oklahoma, Oregon, South Dakota, Utah, Washington and Wyoming, beginning with the fiscal year ending June thirtieth, nineteen hundred and one, including the surplus of fees and commissions in excess of allowances to registers and receivers, and excepting the five per centum of the proceeds of the sales of public lands in the above States set aside by law for educational and other purposes, shall be, and the same are hereby, reserved, set aside, and appropriated as a special fund in the Treasury *to be known as the 'reclamation fund,'* to be used in the examination and survey for and the construction and *maintenance* of irrigation works for the storage, diversion and development of waters for the reclamation of arid and semiarid lands in the said States and

Territories, and for the *payment of all other expenditures* provided for in this Act: Provided, That in case the receipts from the sale and disposal of public lands other than those realized from the sale and disposal of lands referred to in this section are insufficient to meet the requirements for the support of agricultural colleges in the several States and Territories, under the Act of August thirtieth, eighteen hundred and ninety, entitled 'An Act to apply a portion of the proceeds of the public lands to the more complete endowment and support of the colleges for the benefit of agriculture and the mechanic arts, established under the provisions of an Act of Congress, approved July second, eighteen hundred and sixty-two,' the deficiency, if any, in the sum necessary for the support of the said colleges shall be provided for from any moneys in the Treasury not otherwise appropriated.

Sec. 2. That the Secretary of the Interior is hereby authorized and directed to make examinations and surveys for, and to locate and construct, as herein provided, irrigation works for the storage, diversion and development of waters, including artesian wells, and to report to Congress at the beginning of each regular session as to the results of such examinations and surveys, giving estimates of cost of all contemplated works, the quantity and location of the lands which can be irrigated therefrom, and all facts relative to the practicability of each irrigation

project; also the cost of works in process of construction as well as of those which have been completed.

Sec. 3. That the Secretary of the Interior shall, before giving the public notice provided for in section four of this Act, withdraw from public entry the lands required for any irrigation works contemplated under the provisions of this Act, and shall restore to public entry any of the lands so withdrawn when, in his judgment, such lands are not required for the purposes of this Act; and the Secretary of the Interior is hereby authorized, at or immediately prior to the time of beginning the surveys for any contemplated irrigation works, to withdraw from entry, except under the homestead laws, any public lands believed to be susceptible of irrigation from said works: Provided, That all lands entered and entries made under the homestead laws within areas so withdrawn during such withdrawal shall be subject to all the provisions, limitations, charges, terms, and conditions of this Act; that said surveys shall be prosecuted diligently to completion, and upon the completion thereof, and of the necessary maps, plans and estimates of cost, the Secretary of the Interior shall determine whether or not said project is practicable and advisable, and if determined to be impracticable or unadvisable, he shall thereupon restore said lands to entry; that public lands which it is proposed to irrigate by means of any contem-

plated works shall be subject to entry only under the provisions of the homestead laws in tracts of not less than forty nor more than one hundred and sixty acres, and shall be subject to the limitations, charges, terms and conditions herein provided: Provided, That the commutation provisions of the homestead laws shall not apply to entries made under this Act.

Sec. 4. That upon the determination by the Secretary of the Interior that any irrigation project is practicable, he may cause to be let contracts for the construction of the same, in such portions or sections as it may be practicable to construct and complete as parts of the whole project, providing the necessary funds for such portions or sections are available in the reclamation fund, and thereupon he shall give public notice of the lands irrigable under such project, and limit of area per entry, which limit shall represent the acreage which, in the opinion of the Secretary, may be reasonably required for the support of a family upon the lands in question; also of the charges which shall be made per acre upon the said entries, and upon lands in private ownership which may be irrigated by the waters of the said irrigation project, and the number of annual installments, not exceeding ten, in which such charges shall be paid and the time when such payments shall commence. The said charges shall be determined with a view of returning to the reclamation fund the estimated *cost of construction*

of the project, and shall be apportioned equitably: Provided, That in all construction work eight hours shall constitute a day's work, and no Mongolian labor shall be employed thereon.

Sec. 5. That the entryman upon lands to be irrigated by such works shall, in addition to compliance with the homestead laws, reclaim at least one-half of the total irrigable area of his entry for agricultural purposes, and before receiving patent for the lands covered by his entry shall pay to the Government the *charges apportioned* against such tract, as provided in *section four*. No right to the use of water for land in private ownership shall be sold for a tract exceeding one hundred and sixty acres to any one land owner, and no such sale shall be made to any land owner unless he be an actual *bona fide* resident on such land, or occupant thereof residing in the neighborhood of said land, and no such right shall permanently attach until all payments therefor are made. The annual installments shall be paid to the receiver of the local land office of the district in which the land is situated, and a failure to make any two payments when due shall render the entry subject to cancellation, with the forfeiture of all rights under this Act, as well as of any moneys already paid thereon. All moneys received from the above sources shall be paid into the reclamation fund. Registers and receivers shall be allowed the usual commissions on all moneys paid for lands entered under this Act.

Sec. 6. *That the Secretary of the Interior is hereby authorized and directed to use the reclamation fund for the operation and maintenance of all reservoirs and irrigation works constructed under the provisions of this Act: Provided, That when the payments required by this Act are made for the major portion of the lands irrigated from the waters of any of the works herein provided for, then the management and operation of such irrigation works shall pass to the owners of the lands irrigated thereby, to be maintained at their expense* under such form of organization and under such rules and regulations as may be acceptable to the Secretary of the Interior: Provided, That the title to and the management and operation of the reservoirs and the works necessary for their protection and operation shall remain in the Government until otherwise provided by Congress.

Sec. 7. That where in carrying out the provisions of this Act it becomes necessary to acquire any rights or property, the Secretary of the Interior is hereby authorized to acquire the same for the United States by purchase or by condemnation under judicial process, and to pay from the reclamation fund the sums which may be needed for that purpose, and it shall be the duty of the Attorney-General of the United States upon every application of the Secretary of the Interior, under this Act, to cause proceedings to be commenced for condemnation within thirty

days from the receipt of the application at the Department of Justice.

Sec. 8. That nothing in this Act shall be construed as affecting or intended to affect or to in any way interfere with the laws of any State or Territory relating to the control, appropriation, use, or distribution of water used in irrigation, or any vested right acquired thereunder, and the Secretary of the Interior, in carrying out the provisions of this Act, shall proceed in conformity with such laws, and nothing herein shall in any way affect any right of any State or of the Federal Government or of any land owner, appropriator, or user of water in, to, or from any interstate stream or the waters thereof: Provided, That the right to the use of water acquired under the provisions of this Act shall be appurtenant to the land irrigated, and beneficial use shall be the basis, the measure, and the limit of the right.

Sec. 9. That it is hereby declared to be the duty of the Secretary of the Interior in carrying out the provisions of this Act, so far as the same may be practicable and subject to the existence of feasible irrigation projects, to expend the major portion of the funds arising from the sale of public lands within each State and Territory hereinbefore named for the benefit of arid and semiarid lands within the limits of such State or Territory: Provided, That the Secretary may temporarily use such portion of said funds for

the benefit of arid or semiarid lands in any particular State or Territory hereinbefore named as he may deem advisable, but when so used the excess shall be restored to the fund as soon as practicable, to the end that ultimately, and in any event, within each ten-year period after the passage of this Act, the expenditures for the benefit of the said States and Territories shall be equalized according to the proportions and subject to the conditions as to practicability and feasibility aforesaid. (Repealed June 25, 1910.)

Sec. 10. That the Secretary of the Interior is hereby authorized to perform any and all acts and to make such rules and regulations as may be necessary and proper *for the purpose of carrying the provisions of this Act into full force and effect.*"

It has seemed clear to us that the unambiguous language of the Act requires the charges for operation and maintenance to be paid out of the "Reclamation Fund" until such time as the major portion of the lands under a project shall have been paid for, when the management shall pass to the water users, *then* to be maintained at their expense. It has been the contention of Government that the Act is to be so construed as to permit the Secretary of the Interior to keep the "Reclamation Fund" intact without diminution on account of maintenance charges, and arbitrarily levy and collect by coercive measures of his own invention the charges of operation and mainte-

nance, prior to the time when the major portion of the lands have been paid for as provided for in Section 6 of the Act.

It is admitted in this case that the period when the major portion of the lands have been paid for and the management of the ditch is ready to pass to the water users under Section 6 has not been reached.

We will state this as our initial premise, to which it is believed no one will be found unwilling to subscribe; that under our scheme of government it is the function of Congress to make the law. It is believed no suggestion need be made to this tribunal of the danger which is apt to attend a usurpation of this function by any other department.

Assuming without further argument our initial premise, let us analyze the Act to determine if there is in it any ambiguity which would lay it open to construction, and in order that we may determine if Congress has failed to clearly express its meaning by the use of apt expression.

By the first section of the Act it is provided that a fund shall be created from the proceeds of the sale of public land in certain western states, and that this fund, without contribution from any other source, is designated in the Act as "Reclamation Fund" (*sic*). In the same section there follows a direction that this fund, so created as aforesaid, shall be "used in the examination and survey for the construction and *maintenance* * * * and for the *payment of all other expenditures* provided for in this act."

It would appear difficult to invent an expression which would more clearly require the devotion of the "Reclamation Fund" to the payment of charges for maintenance as well as all other expenditures provided for in the Act. The direction seems to be as explicit as words can make it, and we respectfully submit that if this section stood alone it would effectually foreclose the contention now made by Government that none of the "Reclamation Fund" is to be used for maintenance.

Does not all argument approach fatuity which requires the contention that the "Reclamation Fund" shall be held intact and no part of it used for maintenance, when here is an express direction by the law-making power that it *shall* be used for that very purpose?

But the Congress did not stop with this single declaration of its purpose, but at various places in the Act expressed the same design in terms no less clear, as we shall proceed to indicate.

In the fourth section of the Act, in directing how charges should be apportioned to the acreage under the ditch for the purpose of fixing the price at which water is to be sold, it is expressly provided that the charges shall be fixed so as to return to the fund the *cost of construction*. Nowhere is there a provision made for the return to the fund of any of the cost except the cost of construction. Had Congress intended that the fund should never be diminished by maintenance charges, here would have been an apt place to express such an intention.

Again, Section 5 of the Act provides the conditions which must be performed by the entryman as antecedent to his right to receive a patent, and it is there provided that he shall have such patent when he shall have paid the "charges apportioned * * * in Section 4." The charges apportioned in Section 4 are the *charges of construction* alone. If Congress had intended that the entryman should pay maintenance charges, or any charges in addition to the cost of construction, it is not conceivable that it would have failed at this place to provide that those additional charges should be paid by the entryman as a precedent of his right to receive a patent.

But when Section 6 of the Act is reached, it would seem to one who scrutinizes it that Congress had almost anticipated that such a contention as is now being urged against us might be made and had seen fit to put it at rest in advance. The lexicons may contain words calculated to convey with more clearness the meaning we assert should be given the Act, but we would be unable to select such words or to shape them in clear phraseology. By this section, the Secretary is not only authorized but he is *directed* to make use of the "Reclamation Fund" for the *operation* and *maintenance* not only of the reservoirs but of all "irrigation works constructed under the provisions of this Act."

Now it is contemplated that during all this time the management and operation of the works shall remain, as they still are in our case, with the officers of the Reclamation Department; but when the time

shall be reached that the major portions of the lands under the ditch shall have been paid for, the management and operation shall be taken over by the water users themselves under some form of organization and under rules to be approved by the Secretary of the Interior, and *then* the works shall be maintained at the water users' expense.

This is the act as the law-making body saw fit to write it. If it be as clear in its meaning as it has seemed to us, then there is no function for this tribunal to perform except to interpret it as written and enforce the clearly expressed design of Congress. If there be no ambiguity in the Act, there is no room for construction.

In *Hamilton v. Rathbone,* 175 U. S. 421, this court spoke as follows:

> "Indeed the cases are so numerous in this court to the effect that the *province of construction lies wholly within the domain of ambiguity,* that an extended review of them is quite unnecessary."

In *United States v. Goldenberg,* 168 U. S. 102, this tribunal said:

> "The primary and general rule of statutory construction is that the intent of the lawmaker is to be found in the language that he has used. He is presumed to know the meaning of words and the rules of grammar. The courts have no function of legislation, and simply seek to ascertain the will of the legislator. It is true there are

cases in which the letter of the statute is not deemed controlling, but the cases are few and exceptional, and only arise when there are cogent reasons for believing that the letter does not fully and accurately disclose the intent. No mere omission, no mere failure to provide for contingencies, which it may seem wise to have specifically provided for, justify any judicial addition to the language of the statute."

In *Lake County v. Rollins,* 130 U. S. 670, you made use of the following emphatic expression:

"To get at the thought or meaning expressed in a statute, a contract or a constitution, the first resort, in all cases, is to the natural signification of the words, in the order of grammatical arrangement in which the framers of the instrument have placed them. If the words convey a definite meaning which involves no absurdity, nor any contradiction of other parts of the instrument, then that meaning, apparent on the face of the instrument, must be accepted, and neither the courts nor the legislature have the right to add to it or take from it. *Newell v. People,* 7 N. Y. 9, 97; *Hills v. Chicago,* 60 Illinois 86; *Denn v. Reid,* 10 Pet. 524; *Leonard v. Wiseman,* 31 *Maryland,* 201, 204; *People v. Potter,* 47 N. Y. 375; Cooley, Const. Lim. 57; Story on Const. Sec. 400; *Beardstown v. Virginia,* 76 Illinois 34. So, also, where a law is expressed in plain and unambiguous terms, whether those terms are general or limited, the legislature should be intended

to mean what they have plainly expressed, and consequently no room is left for construction. * * *

Words are the common signs that mankind make use of to declare their intention to one another; and when the words of a man express his meaning plainly, distinctly and perfectly, we have no occasion to have recourse to any other means of interpretation."

INTERPRETATION BY THE EXECUTIVE DEPARTMENT

Contemporaneous and Practical Construction

During the progress of this litigation the most emphatic contention that has been made against us is that the Interior Department has for some time placed the construction upon this Act for which the appellants now contend, and that that construction should be now followed by the judicial department. We choose to put that contention in another way, for this is what it means: For some time the Interior Department has disobeyed the express mandate of the law, and it is now insisted that the statute has been in effect modified by this disobedience. It will be a new doctrine when it is announced that malfeasance may ripen into an amendment of the law. Given a case where there can be a real question as to the meaning intended to be expressed by the law-making body and attention will be given to a long continued interpretation placed upon the statute by the Executive Department, but it is not the law that the Execu-

tive Department can create an ambiguity where none occurs and upon this pretext insist that its misinterpretation shall define the law.

Judge Cooley, in his work upon Constitutional Limitations (Cooley Const. Lim., 7th Ed., p. 105), says:

> "Where, however, no ambiguity or doubt appears in the law, we think the same rule obtains here as in other cases, that the court should confine its attention to the law, and not allow extrinsic circumstances to introduce a difficulty where the language is plain. To allow force to a practical construction in such a case would be to suffer manifest perversions to defeat the evident purpose of the lawmakers."

It is interesting to note how often this court has spoken to emphasize the same doctrine. From *Houghton v. Payne,* 194 U. S. 99, we quote the following:

> "But in addition to these considerations it is well settled that it is only where the language of the statute is ambiguous and susceptible of two reasonable interpretations that weight is given to the doctrine of contemporaneous construction. *United States v. Graham,* 110 U. S. 219; *United States v. Finnell,* 195 U. S. 236. Contemporaneous construction is a rule of interpretation, but it is not an absolute one. It does not preclude an inquiry by the courts as to the original correctness of such construction. A custom of the de-

partment, however, long continued by successive officers, must yield to the positive language of the statute. As was said in the Graham case (p. 221), 'If there were ambiguity or doubt, then such a practice, begun so early and continued so long, would be in the highest degree persuasive, if not absolutely controlling, in its effect. But with the language clear and precise and with its meaning evident there is no room for construction and consequently no need of anything to give it aid. The cases to this effect are numerous. *Edwards' Lessee v. Darby,* 12 Wheat. 206; *United States v. Temple,* 105 U. S. 97; *Swift Co. v. United States,* 105 U. S. 691; *Ruggles v. Illinois,* 108 U. S. 526.' "

In *United States v. Graham,* 110 U. S. 219, this court rejected the suggestion that it was in any wise bound to follow the construction which had been placed upon an act of Congress by the Navy Department. Chief Justice Waite, in writing the opinion, said:

"Such being the case, it matters not what the practice of the departments may have been or how long continued, for it can only be resorted to in aid of interpretation, and 'it is not allowable to interpret what has no need of interpretation.' If there were ambiguity or doubt, then such a practice, begun so early and continued so long, would be in the highest degree persuasive, if not absolutely controlling in its effect. But with language clear and precise and with its meaning

> evident, there is no room for construction, and consequently no need of anything to give it aid. The cases to this effect are numerous. *Edwards' Lessee v. Darby,* 12 Wheat. 206; *United States v. Temple,* supra; *Swift Co. v. United States,* 105 U. S. 691; *Ruggles v. Illinois,* 108 U. S. 526."

In *United States v. Alger,* 152 U. S. 384, the settled practice of the Navy Department for many years was urged as a reason why the court should adopt the construction placed by that department upon an act of Congress. In rejecting this contention, Mr. Justice Gray, in speaking for the court, said:

> "If the meaning of that act were doubtful, its practical construction by the Navy Department would be entitled to great weight. But as the meaning of the statute, as applied to these cases, appears to this court to be perfectly clear, no practice inconsistent with that meaning can have any effect. *Swift Co. v. United States,* 105 U. S. 691, 695; *United States v. Graham,* 110 U. S. 619; *United States v. Tanner,* 147 U. S. 661."

Nor was the Land Department permitted to control the court in its interpretation of a statute in the case of *Webster v. Luther,* 163 U. S. 331, where Mr. Justice Harlan, speaking for the court, said:

> "We cannot give to this practice in the land office the effect claimed for it by the plaintiff in error. The practical construction given to an act of Congress, fairly susceptible of different

> constructions, by one of the Executive Departments of the Government, is always entitled to the highest respect, and in doubtful cases should be followed by the courts, especially when important interests have grown up under the practice adopted. *Bate Refrigerating Co. v. Sulzberger,* 157 U. S. 1, 34; *United States v. Healey,* 160 U. S. 136, 141. But this court has often said that it will not permit the practice of an Executive Department to defeat the obvious purpose of a statute."

The same contention was again rejected in *St. Paul, etc., Railway Co. v. Phelps,* 137 U. S. 528. The following appears in the syllabus:

> "Where the language of a series of statutes is dubious, and open to different interpretations, the construction put upon them by the Executive Department charged with their execution has great and generally controlling force with this court; but where a statute is free from all ambiguity, the letter of it is not to be disregarded in favor of a presumption as to the policy of the Government, even though it may be the settled practice of the department."

The court refused to follow the Patent Department in the case of *Bate Refrigerating Company v. Sulzberger,* 157 U. S. 1, saying:

> "It is not only the safer course to adhere to the words of a statute, construed in their ordinary import, instead of entering into any inquiry

as to the supposed intention of Congress, *but it is the imperative duty of the court to do so.*"

In the case of *Fairbank v. United States,* 181 U. S. 310, will be found a declaration as emphatic as it could be made, that the courts will not yield to the interpretation given to the statutes by other departments of the government. You said:

> " 'Such being the case, it matters not what the practice of the departments may have been or how long continued, for it can only be resorted to in aid of interpretation, and "it is not allowable to interpret what has no need of interpretation." If there were ambiguity or doubt, then such a practice, begun so early and continued so long, would be in the highest degree persuasive, if not absolutely controlling in its effect. But with language clear and precise, and with its meaning evident, there is no room for construction, and consequently no need of anything to give it aid. The cases to this effect are numerous.' "
>
> " 'If it were a question of doubt, the construction given to this clause prior to October, 1885, might be decisive; but, as it is clear to us that this construction was erroneous, we think it is not too late to overrule it. *United States v. Graham,* 110 U. S. 219; *Swift Co. v. United States,* 105 U. S. 691. It is only in cases of doubt that the construction given to an act by the department charged with the duty of enforcing it becomes material.' "

" 'If the meaning of that act were doubtful, its practical construction by the Navy Department would be entitled to great weight. But as the meaning of the statute, as applied to these cases, appears to this court to be perfectly clear, no practice inconsistent with that meaning can have any effect.' "

" 'The practical construction given to an act of Congress, fairly susceptible of different constructions, by one of the Executive Departments of the Government is always entitled to the highest respect, and in doubtful cases should be followed by the courts, especially when important interests have grown up under the practice adopted. *Bate Refrigerating Co. v. Sulzberger*, 157 U. S. 1, 34; *United States v. Healey*, 160 U. S. 136, 141. But this court has often said that it will not permit the practice of an Executive Department to defeat the obvious purpose of a statute.' "

"From this *resume* of our decisions it clearly appears that practical construction is relied upon only in cases of doubt. We have referred to it when the construction seemed to be demonstrable, but then only in response to doubts suggested by counsel. Where there was obviously a matter of doubt, we have yielded assent to the construction placed by those having actual charge of the execution of the statute, but where there was no doubt we have steadfastly declined to recognize any force in practical construction. Thus, before

> any appeal can be made to practical construction, it must appear that the true meaning is doubtful."

In the later case of *United States v. United Verde Copper Co.*, 196 U. S. 207, there was under consideration a statute which permitted the use of timber on the public lands for "building, agriculture, mining and other domestic purposes." The Secretary of the Interior had construed the word "domestic" as relating solely to household purposes. The practice of the department had followed this construction. The court, however, rejected it, saying:

> "But there is a more absolutely fatal objection to the regulation. The Secretary of the Interior attempts by it to give an authoritative and final construction of the statute. This, we think, is beyond his power. * * * If rule 7 is valid, the Secretary of the Interior has power to abridge or enlarge the statute at will. If he can define one term, he can another. If he can abridge, he can enlarge. Such power is not regulation; it is legislation. The power of legislation was certainly not intended to be conferred upon the Secretary."

We have quoted so liberally from the announcements of this court upon this subject, not because we have deemed that the rule itself was ever questioned, but for the purpose of indicating the variety of instances in which it has been applied. We assert with a certainty of conviction that in not one of the cases

just referred to was there before the court a statute, the meaning of which could be said to be less questionable than that of the statute we are considering in the present case. Indeed, in the *United Verde case,* it is said in the opinion that there is an ambiguity in the words of the statute, as indeed there clearly is, yet the court does not hesitate to reject the construction placed upon the statute by the Interior Department merely because it does not appear to the court to be the true construction.

INTERPRETATION BY SUBSEQUENT LEGISLATION

It will, we anticipate, be again contended, as it was in both courts below, that an interpretation has been given the "Reclamation Act" by a subsequent Congress. Judge Rudkin of the District Court cites these statutes in his opinion. It is claimed they are sufficient to indicate the interpretation given to the act in question by Congress. A brief reference to these statutes, however, will demonstrate that appellants' contention in this regard at least is most attentuated.

The Act of March 6, 1906 (34 St. L. 53), is an Act relating to the disposition of surplus allotted lands of the Yakima Indian Reservation. After providing for the fixing of the price at which said lands shall be disposed, this expression is used, it being the expression relied upon by the Government in this case: "Such payments shall be in addition to the charges for construction and maintenance of the irrigation

system made payable into the Reclamation Fund by the provisions of the Reclamation Act."

The Act of March 1, 1907 (34 St. L. 1037), is an act relating to the disposition of lands of the Crow Indians, and contains a provision in substantially the words just quoted.

The Act of May 30, 1908 (35 St. L. 562), contains substantially the same expression with relation to the disposal of lands in the Fort Peck Indian Reservation.

These are the only provisions contained in subsequent legislation which it may be contended indicate that Congress read the "Reclamation Act" as containing a provision that the maintenance and operation charges should be paid otherwise than out of the "Reclamation Fund" prior to such time as the major portion of the lands should be paid for, and we must, therefore, conclude, assuming as we must, that Congress had before it the provisions of the "Reclamation Act," that it intended, in the subsequent acts. to refer to those charges for maintenance and operation which were provided by the "Reclamation Act" to be paid *after the period was reached when the major portion of the lands had been paid for and the management of the ditch passed to the water users.* But if we concede, as the Government will contend, that the words used indicate that Congress interpreted the "Reclamation Act" as providing for the payment of maintenance and operation charges otherwise than out of the "Reclamation Fund" prior to the time this period was reached, an all sufficient answer lies in the

declaration that if the subsequent Congress put such an interpretation upon the Act it was and is a wrong interpretation, as the words of the Act itself indisputably demonstrate.

The Act of June 21, 1906 (34 St. L. 327), also relied upon, contains a provision that upon the sale of lands allotted to certain Indians the proceeds should be placed in a fund to be held in trust to pay construction and maintenance charges during the trust period. This is a distinct phase of legislation relating to the care of Indian funds, and cannot be said to imply any interpretation of the "Reclamation Act."

The Act of April 30, 1908, is an Act relating to Indian appropriations, and empowers the Secretary of the Interior to make such arrangements as he shall deem proper with regard to allotted Indian lands which may fall under a reclamation project, and provides "that no lien or charge for *construction, operation or maintenance* shall thereby be created against any such reserve lands." It is not a legitimate contention that this provision indicates an interpretation by Congress or an evidence of the policy of that body with regard to reclamation projects in general.

The Act of March 3, 1909 (35 St. L. 798), has an identical provision relating to the same subject matter and using the same words.

The Act of February 2, 1911 (36 St. L. 975), is also relied upon as supporting their contention. This Act provides for the disposition of surplus waters secured by any reclamation work to individuals, corporations

or associations engaged in furnishing water for irrigation projects, and it provides that in fixing the cost at which such surplus shall be sold the Secretary shall take into consideration the cost of the construction and maintenance of the reservoir and canal. By the second section of this Act the Secretary is authorized in carrying out the provisions of the "Reclamation Act" to co-operate with private water users and associations for impounding, delivering and carrying water, and contains these words: "Provided that the title to and management of the works so constructed shall be subject to the provisions of Section 6 of said (Reclamation) Act."

It thus appears that at this time Congress had before it Section 6 of the "Reclamation Act," and no suggestion is made as to its modification or amendment.

Congress passed the Act of June 25, 1910 (36 St. L. 835), which provides for the issuance of bonds, the proceeds of which shall be covered into the "Reclamation Fund." By the latter Act, Section 9 of the "Reclamation Act" is expressly repealed, and no attempt is made to alter or repeal any of the specific provisions of the other sections.

We take the liberty of calling to your Honors' attention some of your announcements relative to legislative interpretation. In *Hamilton v. Rathbone*, 175 U. S. 419, it was said:

> "The general rule is perfectly well settled that, where a statute is of doubtful meaning and susceptible upon its face of two constructions, the

Court may look into prior and contemporaneous acts, the reasons which induced the act in question, the mischiefs intended to be remedied, the extraneous circumstances, and the purpose intended to be accomplished by it, to determine its proper construction. *But where the act is clear upon its face, and when standing alone it is fairly susceptible of but one construction, that construction must be given to it.*"

In *Koshkong v. Burton,* 104 U. S. 678, you said:

"In this country, where the legislative power is limited by written constitutions, declaratory laws, so far as they operate upon vested rights, can have no legal effect in depriving an individual of his rights, or to change the rule of construction as to a pre-existing law. Courts will treat such laws with all the respect that is due to them as an expression of the opinion of the individual members of the legislature as to what the rule of law previously was. But beyond that they can have no binding effect; and if the judge is satisfied the legislative construction is wrong, he is bound to disregard it."

The author of Sutherland on Statutory Construction (2 Lewis' Stat. Cons. 2nd Ed. Sec. 447) says:

"The legislature are presumed to know existing statutes, and the state of the law, relating to the subjects with which they deal. Hence, that they would expressly abrogate any prior statutes which are intended to be repealed by

> new legislation. Where there is no express repeal none is deemed to be intended, unless there is such an inconsistency as precludes this assumption; then it yields only to the extent of the conflict."

Nor may the appellants resort to the doctrine of construction by statutes *in pari materia*. This rule, like the other, has no application except where an actual ambiguity exists in the statute, and does not obtain where the intention of the law-making body has been clearly expressed.

In *Barnes v. The Railroads*, 17 Wallace 307, it is said:

> "Where a section or clause of a statute is ambiguous, much aid, it is admitted, may be derived in ascertaining its meaning by comparing the section or clause in question with prior statutes *in pari materia*, but it cannot be admitted that such a resort is a proper one where the language employed by the legislature is plain and free of all uncertainty, as the true rule in such a case is to hold that the statute speaks its own construction."

In *Lamp Chimney Co. v. Brass & Copper Co.*, 91 U. S. 662, the rule is very aptly expressed as follows:

> "Statutes must be interpreted according to the intent and meaning of the legislature; and that intention must, if practicable, be collected from the words of the act itself; or, if the language is ambiguous, it may be collected from other acts

> *in pari materia,* in connection with the words, and sometimes from the cause or necessity of the statute; but where the language of the act is unambiguous and explicit, courts are bound to seek for the intention of the legislature in the words of the act itself, and they are not at liberty to suppose that the legislature intended anything different from what their language imports."

We might multiply citations upon this subject to the point of tediousness, but they are all merely a reiteration of the well defined principle announced by all the courts and text writers, that prior or subsequent legislation may be resorted to to *solve* but never to *create* an ambiguity. If the appellants are compelled to rely upon this contention, their position is ridiculously weak. To assert that subsequent legislation has given the interpretation to the Act for which the appellants now contend, is only another way of asserting that those subsequent acts have amended the "Reclamation Act" in this regard.

When a law making body designs to repeal or amend previous legislation, it has a well recognized method of doing so, so that the purpose cannot easily be mistaken, but no attempt to amend this Act in that way has ever been made by Congress.

A settler upon the public lands, as is the appellee here, makes his contract with the Government, into which contract is read a statute which tells him as plainly as the English language can tell him that charges for the maintenance of the irrigation works

are to be paid not by him but out of the "Reclamation Fund." Now, it is gravely contended that he must turn to the subsequent statute books and looking under the head of legislation relating to the management of Yakima and Crow Indians there discover that Congress has placed an "interpretation" upon the "Reclamation Act," which essentially modifies his contract and his rights thereunder. Is there not warrant for the assertion that such a contention is absurd?

THE OPINION OF THE ATTORNEY GENERAL.

There is to be found an opinion of the Attorney General in 27 Op. Atty. Gen'l, 374, approving the practice of the Interior Department in assessing charges for maintenance and operation against the water users, and it has heretofore been contended that great weight should be given to this opinion.

Let us once be convinced that an opinion has been penned by the learned gentleman whose name this opinion bears and no one could be more inclined than the writer of this brief to give that opinion all the weight it deserves. We have never heard it asserted that under our form of Government even one so high in official life as the Attorney General has the power to change existing law. This particular opinion appears to us to smack of the character of opinion the lawyer is frequently induced to give, it being the opinion which his client has indicated he desires. Such opinions are not always of the soundest. Courts

have uniformly refused to yield their functions out of deference to the opinion of officers of other departments. An apt statement to this effect is made by Judge Sanborn in *Deming v. M'Claughry,* 113 Fed. 639 (affirmed 186 U. S. 49).

> "But the opinions of the officers of the executive department of a Government relative to the construction of a statute whose execution has been intrusted to them justly command and should receive the careful consideration of the courts, and in doubtful cases they should be permitted to lead the way to their decisions. Their opinions ought not to be overruled or disregarded unless upon a deliberate and careful review of the decisions which they render it clearly appears that they are tainted with error. On the other hand, the decisions of these officers are not controlling or conclusive upon the courts. It is the function and duty of the judicial department of the government to construe its statutes and to declare their meaning. That duty the courts may not renounce or abandon to others, and in its discharge they must exercise their own independent judgments, guided only by the established principles of the law and the recognized canons of interpretation. While the opinions of the officers of the executive department of the government may be permitted to lead the way to the proper construction of ambiguous statutes intrusted to them to enforce, yet where the words of the acts are plain, and their meaning is clear,

these must prevail. *Hartman v. Warren,* 76 Fed. 157, 162, 22 C. C. A. 30, 36, 40 U. S. App. 245, 254; *Webster v. Luther,* 163 U. S. 331, 342, 16 Sup. Ct. 963, 41 L. Ed. 179; *U. S. v. Tanner,* 147 U. S. 661, 663, 13 Sup. Ct. 436, 37 L. Ed. 321; *Merritt v. Cameron,* 137 U. S. 542, 11 Sup. Ct. 174, 34 L. Ed. 772; *U. S. v. Graham,* 110 U. S. 219, 3 Sup. Ct. 582, 28 L. Ed. 126; *Swift, C. & B. Mfg. Co. v. U. S.,* 105 U. S. 691, 26 L. Ed. 1108."

The Attorney General seems to fall into the error which diverted Judge Rudkin in the present case and Judge Bean of the Oregon District in the Cantrell case. They assume that the only reasonable course for Congress to have followed would have been to require the maintenance charges to be paid in each instance by the water user. We respectfully submit, with all deference, that it is not for these gentlemen to inquire what would have been the more reasonable course for Congress to follow, their only duty being to require that the course clearly indicated by Congress should be followed. But, as we believe we can presently demonstrate, their assumption is wrong.

NO PRESUMPTION THAT CONGRESS WOULD REQUIRE WATER USERS TO PAY THE COST OF MAINTENANCE.

One who was lately President of the United States declared about the time of the enactment of the "Re-

clamation Act" that it was the policy of the American Government to recognize the reclamation of arid lands as a public measure. His statement will be found quoted by the court in *United States v. Burley*, 179 Fed. 1.

> "It is as right for the national government to make the streams and rivers of the arid region useful by engineering works for water storage as to make useful the rivers and harbors of the humid region by engineering works of another kind. The storing of the floods in reservoirs at the headwaters of our rivers is but an enlargement of our present policy of river control, under which levees are built on the lower reaches of the same streams. * * *
>
> The reclamation and settlement of the arid lands will enrich every portion of our country just as the settlement of the Ohio and Mississippi Valleys brought prosperity to the Atlantic states. The increased demand for manufactured articles will stimulate industrial production, while wider home markets and the trade of Asia will consume the larger food supplies and effectually prevent Western competition with Eastern agriculture. Indeed, the products of irrigation will be consumed chiefly in upbuilding local centers of mining and other industries, which would not otherwise come into existence at all. Our people as a whole will profit, for successful home making is but another name for the upbuilding of the nation."

The authority of government and the inclination of Congress to foster certain institutions by contribution out of the public funds, the benefits of which are enjoyed directly by certain individuals or a certain class, has not been doubted when it is apparent that they contribute indirectly at least to the benefit of the people at large.

The Government maintains lighthouses upon the coast, yet the suggestion has never been made that the support thereof should be paid for wholly by those who navigate the sea. The work which the National Government does upon its rivers and harbors and in keeping open navigable channels has never been required to be paid for by those alone who use the waters. By a system of levees along the Mississippi River the National Government has protected the lands which lie beneath the overflow of that river. Here is a work directly co-related to the work of reclaiming arid lands; yet Congress does not exact the funds to maintain those levees from the land owners who directly enjoy the benefits. Why then should there be any difficulty in understanding why Congress should provide for the maintenance of this public work in the manner it did. Indeed it is unlikely if the propriety of the National Government engaging in such an enterprise is to be defended at all, except upon the ground that it is a public work and one which contributes to the upbuilding of the nation. If it be such an enterprise, then it is by no means remarkable that Congress should not have im-

posed the entire cost of its maintenance upon those alone who profit most directly from it.

Nor should it be difficult to appreciate the reason why Congress postponed the period when the maintenance charge should be borne by the water user until such time as the major portion of the lands had been paid for. If settlers were to be invited to attempt the cultivation of reclaimed lands, the fact was appreciated that they would ordinarily be found amongst those who had little reserve capital. If they should undertake to wring a livelihood from a reluctant soil, they must be relieved of expense so far as possible until they should have their venture under way. Houses and barns would be required to be built; the rough land must be cleared of brush; trees must be planted which would not mature for some years. During this time the Government would control the irrigation works and pay for its maintenance, but later, when the time should come that the major portion of lands were paid for, it was fair to presume that the settler would then have reached that degree of prosperity when he could afford to pay those charges, and for that reason the exaction of the charges from the water user was postponed until that time.

REPORTS OF COMMITTEE AND DEBATES IN CONGRESS MAKE THE PURPOSE CLEAR.

If the words of the enactment were lacking at all in clarity, so that resort need be had or were proper

to anything else in order to determine the meaning of Congress, it would seem that all doubt would be removed by the reports of committees and debates in Congress. We quote from the report of the Senate Committee touching this identical Act, there being afterwards proposed no amendments material to this controversy. (See Cong. Rec. Vol. 35, Part 3, p. 2276):

> "It also provides that the cost of operation and maintenance of reservoirs and irrigation works *shall be paid from the irrigation fund,* but when payments are made on the major portion of the lands irrigated under any project, the management and operation of all works, except reservoirs, and the works necessary for their operation and production, shall pass to the owners of the land, to be maintained at their expense under rules prescribed by the Secretary."

The propriety of reference to reports of committees as an aid to construction, where there is any ambiguity, is sustained in *Johnson v. Southern Pacific Railway Co.*, 196 U. S. 20.

When the proposed measure was under debate in the lower house of Congress, the advocacy of the bill was led by Mr. Jones of Washington, now Senator from this state. His remarks were exhaustive and thorough, in the course of which he said (See Cong. Rec. Vol. 35, Part 7, p. 6753):

> "* * * In other words, the Government gets its money back. This payment, it may be

> said, however, goes into the reclamation fund to be re-expended. This is true, but whenever the Government ceases to construct irrigation works and all the land is taken and paid for, the fund is entire and can be turned back into the General Treasury, so that in the end the Government will receive all of its expenditures, *except, probably, such amount as may be expended for maintenance.*"

The opposition to the bill was led by Mr. Ray of New York. During the course of his remarks he said (See Cong. Rec. Vol. 35, Part 7, p. 6683):

> "It is conceded that the money never can come back, because the cost of maintenance or the cost of the extension and repairs will use all."

An exhaustive study of the debates anent this subject show that these statements went unchallenged.

As we have contended, if the terms of the bill be clear and unambiguous resort may not be had to anything extraneous as an aid to construction; but let us assume that casuistry can torture the plain terms of this Act into an ambiguity, then we assert that the quotations from the debates in Congress leave no question as to the intent which was in the minds of the law-makers.

But counsel will perhaps dispute our right to resort to these debates in order to demonstrate what was the intent of Congress. If there be that ambiguity in the Act for which they contend, we believe we have that right.

Chief Justice Marshall said, in *United States v. Fisher*, 2 Cranch, 386: "Where the intent is plain, nothing is left to construction. Where the mind labors to discover the design of the legislature, it seizes everything from which aid can be derived."

While we are aware that courts have repeatedly said that resort is not to be had to the debates in legislative bodies to determine the construction of an Act, we find courts repeatedly resorting to that very source for enlightenment. We quote from the syllabus in *Wadsworth v. Boysen* (C. C. of A., 8th Cir.), 148 Fed. 771:

> "While, in general, the debates in Congress are not appropriate sources of information from which to discover the meaning of the language of a statute passed by that body, yet where the only question of fact is whether Congress, when it adopted an act, understood that under a given proviso the right was given to a beneficiary to select 640 acres of mineral or coal land within a certain area, the statement of members in debate may be resorted to for the purpose of ascertaining the general object of the proviso."

See also to the same effect *Binns v. United States*, 194 U. S. 486.

So. *Roberts v. Pac. Co.*, 186 Fed. 938.
Jennison v. Kirk, 98 U. S. 453.
United States v. Wilson, 58 Fed. 768.
Ex Parte Farley, 40 Fed. 66.
Simonds v. St. Louis, etc., 192 Fed. 353.

Indeed, the soundness of the rule can well be questioned, which would prevent resort in case of doubt as to the meaning of an Act to anything so conclusive as the statements contained in these debates appear to be.

We have not yet been favored with the brief of the learned Solicitor General and are, therefore, not advised as to what he shall urge as his reasons why the contention of the reclamation officers should be upheld. Unless he shall have something more to suggest than has heretofore been presented during the progress of this case in the two courts below, we shall retain our conviction that this case presents perhaps the most palpable instance of executive usurpation we have ever encountered. Whatever we may think of the zeal of the reclamation officers in endeavoring to increase the revenues of their government at the expense of the water users, it is a practice not to be tolerated without a departure from all the rules which have heretofore governed the construction and enforcement of legislative enactment.

Respectfully submitted,

W. T. DOVELL,
Solicitor for Appellee.

SWIGART *v.* BAKER.

APPEAL FROM THE CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

No. 944. Argued April 9, 10, 1913.—Decided May 26, 1913.

A statutory provision for charging cost of construction of an improvement against property benefited may include the cost of maintenance as well as of actual construction; and in determining the scope of the provision the court may arrive at the legislative intent by examining the history of the statute.

The history of the Reclamation Act of 1902 shows that it was the intent of Congress that the cost of each irrigation project should be assessed against the property benefited and that the assessments as fast as collected should be paid back into the fund for use in subsequent projects without diminution. This intent cannot be carried out without charging the expense of maintenance during the Government-held period as well as the cost of construction.

Subsequent legislative construction of a prior act may properly be examined as an aid to its interpretation: and so *held* that statutes passed since the Reclamation Act of 1902 indicate that Congress has construed the provisions of that act as authorizing the Secretary of the Interior to assess cost of maintenance as well as of construction of irrigation projects upon the land benefited.

Where the executive officer charged with its enforcement annually reports to Congress the same construction of a statute, it is significant if Congress never has taken any adverse action in regard to such construction.

Quære whether Congress may not by legislation construe a prior statute so that as to all matters subsequently arising the action is legislative in character.

The repeated and practical construction of the Reclamation Act of 1902 by both Congress and the Secretary of the Interior, in charging cost of maintenance as well as construction, accords with the provisions of the act taken in its entirety and is followed by this court.

199 Fed. Rep. 865, reversed.

THE facts, which involve the construction of the Reclamation Act of 1902 and whether the purchaser was

required thereunder to pay the annual charges for maintaining the irrigation project by which his lands are irrigated, are stated in the opinion.

Mr. Assistant Attorney General Knaebel, with whom *Mr. S. W. Williams* and *Mr. W. W. Dyar* were on the brief, for appellant.

Mr. W. T. Dovell for appellee:

The unambiguous language of the act requires the charges for operation and maintenance to be paid out of the "Reclamation Fund" until such time as the major portion of the lands under a project shall have been paid for, when the management shall pass to the water users, and then to be maintained at their expense. The contention of the Government that the act is to be so construed as to permit the Secretary of the Interior to keep the "Reclamation Fund" intact without diminution on account of maintenance charges, and arbitrarily levy and collect by coercive measures of his own invention the charges of operation and maintenance, prior to the time when the major portion of the lands have been paid for as provided for in § 6 of the act, cannot be maintained.

In § 4 of the act, in directing how charges should be apportioned to the acreage under the ditch for the purpose of fixing the price at which water is to be sold, it is expressly provided that the charges shall be fixed so as to return to the fund the cost of construction. Nowhere is there a provision made for the return to the fund of any of the cost except the cost of construction. Had Congress intended that the fund should never be diminished by maintenance charges, here would have been an apt place to express such an intention.

Sections 5 and 6 also support appellee's contention. It is contemplated that during all this time the management and operation of the works shall remain, as they still are

in our case, with the officers of the Reclamation Department; but when the time shall be reached that the major portions of the lands under the ditch shall have been paid for, the management and operation shall be taken over by the water users themselves under some form of organization and under rules to be approved by the Secretary of the Interior, and then the works shall be maintained at the water users' expense.

This is the act as the law-making body saw fit to write it. As it is clear in its meaning there is no function for this tribunal to perform except to interpret it as written and enforce the clearly expressed design of Congress. If there be no ambiguity in the act, there is no room for construction. *Hamilton* v. *Rathbone*, 175 U. S. 421; *United States* v. *Goldenberg*, 168 U. S. 102; *Lake County* v. *Rollins*, 130 U. S. 670.

The contemporaneous and practical construction which the Interior Department has for some time placed upon this act, and which appellant contends should be now followed by the judicial department, is incorrect. The Interior Department has disobeyed the express mandate of the law, and appellants now insist that the statute has been in effect modified by this disobedience. Malfeasance, however, cannot ripen into an amendment of the law. Cooley Const. Lim., 7th ed., p. 105; *Houghton* v. *Payne*, 194 U. S. 99; *United States* v. *Graham*, 110 U. S. 219; *United States* v. *Alger*, 152 U. S. 384; *Webster* v. *Luther*, 163 U. S. 331; *St. Paul &c. Ry. Co.* v. *Phelps*, 137 U. S. 528; *Bate Refrigerating Co.* v. *Sulzberger*, 157 U. S. 1; *Fairbank* v. *United States*, 181 U. S. 310; *United States* v. *United Verde Copper Co.*, 196 U. S. 207.

As to interpretation by subsequent legislation, if any words used in statutes passed subsequently thereto indicate that Congress interpreted the "Reclamation Act" as providing for the payment of maintenance and operation charges otherwise than out of the "Reclamation

Fund" prior to the time this period was reached, an all sufficient answer is if the subsequent Congress put such an interpretation upon the act it was and is a wrong interpretation, as the words of the act itself indisputably demonstrate. See in this respect *Hamilton* v. *Rathbone*, 175 U. S. 419; *Koshkong* v. *Burton*, 104 U. S. 678; Sutherland on Stat. Constr.; and see 2 Lewis' Stat. Cons., 2d ed., § 447.

Appellants may not resort to the doctrine of construction by statutes *in pari materia*. This rule, like the other, has no application except where an actual ambiguity exists in the statute, and does not obtain where the intention of the law-making body has been clearly expressed. *Barnes* v. *Railroad*, 17 Wall. 307, *Lamp Chimney Co.* v. *Brass & Copper Co.*, 91 U. S. 662.

The well defined principle announced by all the courts and text writers is that prior or subsequent legislation may be resorted to to solve but never to create an ambiguity.

When a law making body designs to repeal or amend previous legislation, it has a well recognized method of doing so, so that the purpose cannot easily be mistaken, but no attempt to amend this act in that way has ever been made by Congress.

While the Attorney General in 27 Op. Atty. Gen'l, 374, approved the practice of the Interior Department in assessing charges for maintenance and operation against the water users, under our form of government even one so high in official life as the Attorney General has not the power to change existing law. Courts do not yield their functions out of deference to the opinion of officers of other departments. *Deming* v. *M'Claughry*, 113 Fed. Rep. 639; aff'd 186 U. S. 49.

There is no presumption that Congress would require water users to pay the cost of maintenance. It was the policy of the American Government to recognize the

reclamation of arid lands as a public measure. *United States* v. *Burley*, 179 Fed. Rep. 1.

The Government maintains lighthouses upon the coast, yet the suggestion has never been made that the support thereof should be paid for wholly by those who navigate the sea.

The reports of committee and debates in Congress make the purpose clear that the users shall not pay any charges until after the work is turned over to them, and that the cost of operation and maintenance of reservoirs and irrigation works shall be paid from the irrigation fund. See Cong. Rec., Vol. 35, pt. 3, p. 2276.

Reports of committees may be used as an aid to construction, where there is any ambiguity. *Johnson* v. *Southern Pacific Ry. Co.*, 196 U. S. 20. See also Cong. Rec., Vol. 35, pt. 7, pp. 6683, 6753.

Where the intent is plain, nothing is left to construction. Where the mind labors to discover the design of the legislature, it seizes everything from which aid can be derived. *United States* v. *Fisher*, 2 Cr. 386.

While courts have said that resort is not to be had to the debates in legislative bodies to determine the construction of an act, courts do repeatedly resort to that very source for enlightenment. *Wadsworth* v. *Boysen*, 148 Fed. Rep. 771; *Binns* v. *United States*, 194 U. S. 486; *Roberts* v. *Pac. Co.*, 186 Fed. Rep. 938; *Jennison* v. *Kirk*, 98 U. S. 453; *United States* v. *Wilson*, 58 Fed. Rep. 768; *Ex parte Farley*, 40 Fed. Rep. 66; *Simonds* v. *St. Louis &c.*, 192 Fed. Rep. 353.

MR. JUSTICE LAMAR delivered the opinion of the court.

The Sunnyside Unit of the Yakima Irrigation Project was so far completed in 1909 that the Secretary of the Interior gave notice that water would be furnished for irrigation purposes and that "the charges would be in

two parts: 1. Building of the irrigation system, $52 per acre . . . 2. For operation and maintenance, 95 cents per acre per annum." The appellee, Baker, applied for a water right and paid the assessed charges until 1911, when he refused to pay the 95 cents per acre for maintenance and operation, on the ground that the Secretary had no authority to make such an assessment. The Reclamation officers thereupon threatened to cut off the supply of water and Baker at once filed, in the United States Circuit Court for the Eastern District of Washington, a Bill against them, alleging that the charge for maintenance was illegal, that his crops would be destroyed if water was not furnished and praying that the Reclamation officers should be perpetually enjoined from cutting off the supply of water because of his failure to pay the illegal assessment.

The defendants in their answer set up that the charge of 95 cents per acre, per annum, for maintenance and operation had been lawfully made by the Secretary of the Interior under the power conferred upon him by statute. The case was heard on Bill and Answer and the Bill dismissed. 196 Fed. Rep. 569. Baker took the case to the Circuit Court of Appeals, where, one judge dissenting, the decree was reversed (199 Fed. Rep. 865) on the ground that the Secretary of the Interior could not assess irrigable land with the cost of maintenance and operation.

Since its adoption in 1902 (32 Stat. 388, c. 1093) the act has always been differently construed by the Secretary of the Interior who, in granting water-rights, has uniformly assessed the landowners with the cost of maintenance. The contrary construction by the Circuit Court of Appeals raises a question of great importance to the owners of the land now irrigated. It is of equal importance to the Government and to that part of the public interested in the reclamation of those portions of the arid region which can be irrigated as soon as funds are available. For, by so much as the fund is depleted in the payment of

operating charges at one place, by so much is the reclamation of arid lands elsewhere postponed.

The statute provides that the cost of construction of the Project shall be charged against the land within the irrigable limits. The phrase is not expressly defined and being general in its terms is not necessarily limited to building, but may include the preservation and maintenance of what has been built. For example, a statute authorizing the levy of a tax to construct a sewer was held to empower the city to levy taxes for its maintenance. Power to construct a dock imposed the duty of operating it. Permission to "construct internal improvements" warranted the purchase of a plant already built, and authority to construct a road conferred power to maintain it. *In re Fowler*, 57 N. Y. 60; *Seymour* v. *Tacoma*, 6 Washington, 138; *Attorney General* v. *Boston*, 142 Massachusetts, 200; *Pelham* v. *Woolsey*, 16 Fed. Rep. 418; *Atchison &c. Ry.* v. *McConnell*, 25 Kansas, 370; *Bell* v. *Maish*, 137 Indiana, 226; *Weston* v. *Hancock County*, 98 Mississippi, 800, 54 So. Rep. 307. So, in the present case the statute provides that the Secretary may assess "the cost of construction of the project" without defining the term, and it may assist in arriving at the legislative intent to refer briefly to the facts leading up to the passage of the Reclamation Act.

The official reports show that, in 1902, there were in sixteen States and Territories 535,486,731 acres of public land still held by the Government and subject to entry. A large part of this land was arid, and it was estimated that 35,000,000 acres could be profitably reclaimed by the construction of irrigation works. The cost, however, was so stupendous as to make it impossible for the development to be undertaken by private enterprise, or, if so, only at the added expense of interest and profit private persons would naturally charge. With a view, therefore, of making these arid lands available for agricultural purposes by an expenditure of public money, it was pro-

posed that the proceeds arising from the sale of all public lands in these sixteen States and Territories should constitute a Trust Fund to be set aside for use in the construction of irrigation works—the cost of each Project to be assessed against the land irrigated, and as fast as the money was paid by the owners back into the Trust, it was again to be used for the construction of other works. Thus the fund, without diminution except for small and negligible sums not properly chargeable to any particular Project would be continually invested and reinvested in the reclamation of arid land. See H. R. Report, No. 1468, 57th Congress, 1st session.

The general outline of this plan was approved by Congress, which, on June 17, 1902, passed "An Act appropriating the receipts from the sale and disposal of public lands in certain States and Territories to the construction of irrigation works for the reclamation of arid lands." [1] 32 Stat. 388, c. 1093.

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[1] The proceeds of the public land less certain deductions, were, sec. 1, "reserved, set aside, and appropriated as a special fund in the Treasury to be known as the 'Reclamation Fund,' to be used in the examination and survey for and the construction and maintenance of irrigation works for the storage, diversion, and development of waters for the reclamation of arid and semiarid lands in the said States and Territories, and for the payment of all other expenditures provided for in this Act."

Sec. 5. The entryman upon lands to be irrigated by such works shall, in addition to compliance with the homestead laws, reclaim at least one-half of the total irrigable area of his entry for agricultural purposes, and before receiving patent for the lands covered by his entry shall pay to the Government the charges apportioned against such tract, as provided in section four. . . . The annual installments shall be paid to the receiver of the local land office of the district in which the land is situated, and a failure to make any two payments when due shall render the entry subject to cancellation, with the forfeiture of all rights under this Act, as well as of any moneys already paid thereon. All moneys received from the above sources shall be paid into the reclamation fund. . . .

The statute provided that the money arising from the sales of the public lands in these States and Territories was to be known as the Reclamation Fund and was to be used for the purpose of reclaiming arid lands. Provision was made for preliminary surveys, and when the Secretary determined that a Project was practicable, he was authorized to make contracts for its construction, if there were funds available. The land capable of being irrigated was to be open only to homestead entry and (sec. 4) the Secretary was then to give notice "of the charges which should be made per acre and the number of installments, not exceeding ten, in which the charges should be paid; these charges to be determined with a view of returning to the Reclamation Fund the estimated cost of the construction of the project . . . and all moneys received from the above sources shall be paid into the Reclamation Fund. . . . The Secretary of the Interior is hereby authorized and directed to use the reclamation funds for the operation and maintenance of all reservoirs and irrigation works constructed under the

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Sec. 6. The Secretary of the Interior is hereby authorized and directed to use the reclamation fund for the operation and maintenance of all reservoirs and irrigation works constructed under the provisions of this Act: Provided, That when the payments required by this Act are made for the major portion of the lands irrigated from the waters of any of the works herein provided for, then the management and operation of such irrigation works shall pass to the owners of the lands irrigated thereby, to be maintained at their expense under such form of organization and under such rules and regulations as may be acceptable to the Secretary of the Interior: Provided, That the title to and the management and operation of the reservoirs and the works necessary for their protection and operation shall remain in the Government until otherwise provided by Congress.

Sec. 10. The Secretary of the Interior is hereby authorized to perform any and all acts and to make such rules and regulations as may be necessary and proper for the purpose of carrying the provisions of this Act into full force and effect."

provisions of this act; provided that when the payments required by this act are made for the major portion of the lands irrigated from the waters of any of the works herein provided for, then the management and operation of such irrigation works shall pass to the owners of the lands irrigated thereby to be maintained at their expense; . . . provided that the title to and management and operation of the reservoirs and works necessary for their protection and operation shall remain in the Government until otherwise provided by Congress."

In pursuance of this act, various Works, including that of the Sunnyside Unit of the Yakima Project, were constructed and notice was given of the charges that would be made. At first they were stated in a lump sum, cost of building, maintenance and operation making up the total. After 1906, the charges were separately stated substantially thus: "1. For building, $— per acre; 2. For maintenance and operation, $— per acre per annum." [1]

1. The contention that this last item could not be assessed against the irrigated land is based upon the fact

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[1] Examples of the form of Notice showing such division of charges, are to be found in "Report of Reclamation Service, 1908–1909," pp. 124, 130, 136, 163, 200. The Notice for the Sunnyside Project recites that water "will be furnished from the Sunnyside Project under the provisions of the Reclamation Act . . . and the charges which shall be made per acre of irrigable land which can be irrigated by the waters from said irrigation project are in two parts, as follows:

1. The building of the irrigation system, $52 per acre of irrigable land, payable in not more than 10 annual instalments. . . .

2. For operation and maintenance, which will as soon as the data are available, be fixed in proportion to the amount of water used, with the minimum charge per acre of irrigable land whether water is used or not. The operation and maintenance charge for the irrigation season of 1909, and until further notice, will be 95 cents per acre of irrigable land, for which water is ready in the irrigation season of 1909, whether water is used thereon or not.

that § 4 authorizes the Secretary to make the estimated charges "with a view of repaying the cost of construction of the Project." But an analysis of the act shows that the charges were not limited to the building of the dam or the digging of the canals, but included the purchase of land needed for reservoirs and everything chargeable to "the cost of construction of the project," which Project was later to be turned over as a going concern to the landowners. The cost to the United States represented not only the expense of building but of maintenance up to the time it was surrendered to the water users. And as the Government collected no interest, the result would be that if the cost of maintenance was not returned there would be a constant and heavy diminution of the Reclamation Fund. That fund was the proceeds of public land and was not intended to be diminished for the benefit of any one project, but, without increase by interest and undiminished by local expenses, was again to be used for constructing other works. The cost of surveying those projects which were not developed and the administrative expenses not chargeable to any particular Project might not be repaid, but these sums were so small as to be negligible as against the fundamental idea of the Bill, that the proceeds of public land as a Trust Fund should be kept intact and again invested and reinvested for constructing new irrigation works. But if it should be taxed with cost of maintenance, it follows as a mere matter of mathematics that the Reclamation Fund would be greatly depleted if not entirely consumed and the proceeds of the public domain be thus diverted to the payment of local expenses.

2. If there could be any doubt as to the meaning of the statute, it disappears in the light of congressional construction which may properly be examined as an aid in its interpretation. *Burridge* v. *Detroit*, 117 Michigan, 557. The Secretary of the Interior annually made re-

ports to Congress in which these charges of maintenance and operation were shown. No adverse action was taken as to these assessments by the Secretary. On the contrary, Congress in several instances showed that it construed the act in the same way. This distinctly appears in statutes providing a method by which irrigable lands in Indian reservations might be opened to entry and brought within the limits of an irrigation project. In these cases it was provided that the person taking up such land should pay the amount due to the Indians "*in addition to the charges for construction and maintenance of the irrigation system made payable into the reclamation fund by the provisions of the Reclamation Act.*" (Act March 6, 1906, 34 Stat. 53, c. 518, § 2.) A similar recital is found in the statute relating to the acquisition of irrigable land in the Blackfeet Reservation, where it was provided that if any such lands were "deemed practicable for an irrigation Project under the provisions of the Reclamation Act, said lands shall be disposed of under the provisions of said act and settlers shall pay, *in addition to the cost of construction and maintenance provided therein,* the appraised value of the Indian land." (March 1, 1907, 34 Stat. 1037, c. 2285.) See also 35 Stat. 85, c. 153; *Id.*, 558, 562, c. 237; 36 Stat. 835, c. 407.

3. It is argued that though these expressions show that Congress, in 1906 and 1907, thought that the cost of maintenance was chargeable under the Reclamation Act of 1902, yet no effect should be given to such legislative interpretation since Congress is not authorized to exercise the judicial function and has no power to construe existing statutes. But these acts of 1906 and 1907 were passed before the appellee, Baker, applied for his water-rights in 1909, and there are cases (*State* v. *Orphans' Home*, 37 Oh. St. 275; *Dequindre* v. *Williams*, 31 Indiana, 444), which would support a holding that this language, as to future transactions, was legislative in charac-

ter and incorporated these provisions into the original act. We refer to them, however, as we do to the notices given and charges made by the Secretary of the Interior, as showing the repeated and practical construction which has been given the statute from the beginning, and in the light of which many water-rights have been granted and many hundreds of thousands of dollars for maintenance paid to the Government as a part of "the cost of construction of the project." This practical interpretation by Congress and the Secretary of the Interior accords with the provisions of the act taken in its entirety.

The decree of the Circuit Court of Appeals is reversed, that of the District Court is affirmed and the case remanded to the District Court.

Reversed.